(1)

Supreme Court, U.S.
FILED

No. 01 663 OCT 15 2001

OFFICE OF THE CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT L. MONTGOMERY,

Petitioner

v.

G. RAYMOND TRISLER,

Respondent

On Petition For Writ of Certiorari
To The Supreme Court of the State of Indiana

PETITION FOR WRIT OF CERTIORARI

Robert L. Montgomery
1800 N. Meridian St., Apt. 502
Indianapolis, Indiana 46202
Telephone (317) 554-6370
Telecopier FAX (317) 554-6208

PRO SE

---

98 pp

QUESTIONS PRESENTED

Executive Builders, Inc., a closely held Indiana real estate developer, with a $310,000.00 land investment, sued G. Raymond Trisler on advice of legal counsel who prepared, signed and filed a Complaint for business interference. Trisler, counterclaimed, and filed a third party complaint against Robert L. Montgomery, the acting President and corporate officer of the Counterclaim Defendant. The jury awarded compensatory damages of $15,000.00 to Ray Trisler, and at a punitive damages hearing the next day, tacked on punitive damages of $1,640,000.00 as additional compensation that was 109+ times greater. The questions presented are:

1. Are there constitutional limits on punitive damages that require courts on appeal to determine excessiveness, de novo, where the punishment is grossly disproportional to the gravity of any offense committed, as clearly enunciated by the Supreme Court of the United States in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S. 674, 121 S.Ct. 1678, 149 L.E.2d 674, (2001), and related decisions?

2. Whether a private fine of $1,640,000 awarded as punitive damages, in addition to compensatory damages of $15,000.00 against Robert Montgomery, is an excessive fine, where it bears no relationship to any injury suffered, other than *"mental anguish – all types"* as to which no medical treatment or expenses were incurred, and no other expenses or monetary losses were suffered?

3. Whether Appellant's 8th Amendment rights against judicial imposition of excessive fines and cruel and unusual punishment made applicable to the states under the 14th Amendment, were violated where the Indiana Court of Appeals reviewed a punitive damages award of $1,640,000.00 against Appellant, that bore no relationship whatever to compensatory damages of $15,000.00 previously awarded, under an *"abuse of process"* review standard?

4. Whether the Indiana Supreme Court violated Appellant's 8th Amendment rights against excessive fines made applicable to the States under the 14th Amendment to the United States Constitution in judicially DENYING TRANSFER of the Court of Appeals Judgment for excessiveness, without a *de novo* review?

5. Whether the Courts below denied Appellant the equal protection of the laws guaranteed by the 5th Amendment made applicable to States by the 14th Amendment, in judicially limiting and calibrating punitive damages for other tort-feasors similarly situated, which were capped and limited under IND.CODE Sec. 34-51-3-4, eff. July 1, 1998 to no more than *"three times the compensatory damages or $50,000 whichever is greater"* but allowed punitive damages that were 109+ times more than compensatory damages to stand against Appellant?

6. Whether the refusal by the Indiana Supreme Court on July 18, 2001 to follow stare decisis the intervening United States Supreme Court decision entered on May 14, 2001 in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* to review Appellant's PETITION TO TRANSFER *de novo*, was judicially so far wrong in denying Transfer, that summary reversal of the Indiana Supreme Court Judgment, and the Judgment of the Court of Appeals on the merits, pursuant to Rule 16 of the Supreme Court of the United States is appropriate?

7. Whether refusal by the Indiana Supreme Court on August 31, 2001 to reconsider Denial of Transfer, on Appellant's Motion for Reconsideration filed on August 20, 2001, to which was attached a summary printout of the intervening decision of the Supreme Court of the United States entered on May 14, 2001 in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, was judicially so clearly erroneous that summary reversal of the Judgment of the Indiana Supreme Court on the merits, is appropriate pursuant to Rule 16 of the United States Supreme Court?

PARTIES TO THE PROCEEDINGS

The only parties to the proceedings before the Court, are Appellant Robert L. Montgomery, and Appellee G. Raymond Trisler.

TABLE OF CONTENTS

	PAGE NO
QUESTIONS PRESENTED	i, ii
PARTIES TO THE PROCEEDINGS	iii
TABLE OF CONTENTS	iv
TABLE OF AUTHORITIES	v
DECISION OF INDIANA COURT OF APPEALS BELOW	1
DECISIONS OF INDIANA SUPREME COURT BELOW	1
JURISDICTION	2
CONSTITUTIONAL PROVISIONS INVOLVED	2
STATEMENT	3
REASONS FOR GRANTING THE WRIT	4
I. THE ISSUES ARE RECURRING AND ARE OF CONSIDERABLE PUBLIC IMPORTANCE. .	5
II. THE INDIANA SUPREME COURT REFUSED TO FOLLOW AND APPLY THE DECISION OF THE UNITED STATES SUPREME COURT IN *COOPER INDUSTRIES, INC. v. LEATHERMAN TOOL GROUP, INC.*, 529 U.S., 121 S.Ct. 1678, 149 L.E.2d 674, (2001) MAKING THE DECISIONS BELOW NOT REVIEWED *DE NOVO*, UNMISTAKABLY INCORRECT	10
CONCLUSION	11

TABLE OF AUTHORITIES

CASES	Page
BMW of North America, Inc. v. Gore, 517 U.S. 559, 116 S.Ct.1589, 134 L.Ed.2d 809, (1996)	2, 3, 4, 5, 6, 7
Browning-Ferris Industries of Vermont, Inc., v. Kelko Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.Ed.2d 219, (1989)	7
Coachmen's Industries, Inc. v. Dunn, 719 N.E.2d 1271, 1278, (Ind.App. 1999)	4, 5
Cooper Industries, Inc. v. Leatherman Tool Group, Inc. 532 U.S.___, 121 S.Ct. 1678, 149 L.Ed. 2d 674, (2001)....iv,	3, 7, 8
Executive Builders, Inc. v. Trisler, 741 N.E.2d 351, (Ind.Ct.App. 2000)	4
Federal Deposit Insurance Corp. v. Hamilton, 122 F.3rd 854, (10th Cir. 1997)	4
Furman v. Georgia, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346, (1971)	3
Jeffrey Lane, et. al. v. Hughes Aircraft Company, 22 Cal.4th 405, (CA 2000)	7
Michigan Mutual Insurance Company v. Sports, Inc. 698 N.E.2d 834, (Ind.App. 1999) *trans den.*, 706 N.E.2d 555	5
Saenz v. Fidelity Guaranty Ins. Underwriters, 925 S.W.2d 607, (Tex. 1996)	5
Watkins v. Lundell, 169 F.3rd 540 (8th Cir. 1999), *cert. den.*, ___U.S.___, 120 S.Ct. 324 (1999)	4
Weems v. United States, 217, U.S. 349, (1909)	2

CONSTITUTION, AND STATUTE	
United States Constitution, Amendment V	i, 2
United States Constitution, Amendment VIII	5
United States Constitution, Amendment XIV	5
Indiana Code, Sec. 34-51-3-4, et. seq	ii

No.

IN THE

SUPREME COURT OF THE UNITED STATES

ROBERT L. MONTGOMERY,

Petitioner,

v.

G. RAYMOND TRISLER.

Respondent.

PETITION FOR WRIT OF CERTIORARI

Robert L. Montgomery petitions for a writ of certiorari to review the judicial imposition by the Indiana Supreme Court of an excessive fine of $1,640,000.00 awarded against him on denial of Petition to Transfer, that let stand, a Judgment of the Indiana Court of Appeals affirming punitive damages awarded against him as a *"tithe of 10% of wealth"* that was 109+ times greater than the compensatory damages of $15,000 previously awarded. The punitive damages were grossly disproportional to the gravity of any offense committed, but were reviewed under a wrong *"abuse of discretion"* standard, instead of *de novo* review.

OPINIONS BELOW

The Judgment DENYING TRANSFER was entered by the Indiana Supreme Court on July 20, 2001 per copy attached in

the Appendix hereto. The Judgment of the Indiana Court of Appeals was entered on December 6, 2000, as amended on December 14, 2000 and December 20, 2000 per copy attached in the Appendix hereto, and is reported in 741 NE.2d 351 (Ind.Ct.App. 2000).

JURISDICTION

Jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Section 1257(c), for a right, privilege, and immunity against the imposition of excessive fines and the infliction of cruel and unusual punishment forbidden by the 8th Amendment to the United States Constitution and applied to the States by the 14th Amendment. The Indiana Supreme Court imposed punitive damages of $1,640,000.00 judicially against Robert Montgomery in denying his Petition to Transfer on July 18, 2001, without a *de novo* review that let stand a Judgment of the Court of Appeals entered on December 6, 2001. A Motion to Reconsider was filed on August 20, 2001 and was denied on procedural grounds, without *de novo* review on August 31, 2001.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT V [1791]: No person shall be ... deprived of ... property without due process of law..."

AMENDMENT VIII [1791]: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."

AMENDMENT XIV [1868]: *Section 1* ... No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT

This case presents important constitutional questions in cases against tort-feasors where the punishment is grossly disproportional to the gravity of any offense allegedly committed, and is excessive when imposed without a *de novo* review by the Judiciary.

The Supreme Court of the United States in *Weems v. United States*, 217 U.S. 349, 378-382, (1909) held that ". . .*the proscription of cruel and unusual punishments forbids the judicial imposition of them as well as their imposition by the legislature.*" This Court in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), held that "*punitive damages awards must be reviewed for excessiveness,*" and that the size of the punitive damages awarded in that case was such that the result violated the due process clause of the Fourteenth Amendment on substantive grounds. (517 U.S. 568).

BMW v. Gore was revisited by this Court on May 14, 2001 in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, wherein the Court by *Rehnquist, C.J., and O'Connor, Kennedy, Souter, Thomas and Breyer, JJ.*, joined. *Thomas J.* filed a concurring opinion. *Scalia, J.* filed an opinion concurring in the judgment. *Ginsburg, J.* filed a dissenting opinion. The Court held in an 8 to 1 decision that the constitutionality challenge of awards of punitive damages as to excessiveness be determined under a *de novo* standard of review, rather than an abuse-of-discretion standard, and said:

> *Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendants wrongful conduct, but punitive damages are private fines intended to punish the defendant and deter future wrongdoing. A jury's assessment of the former is essentially a factual determination, but its imposition of the latter is an expression of its moral condemnation.*
>
> *. . .the Fourteenth Amendments Due Process Clause imposes substantive limits on the States discretion, making the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States Furman v. Georgia, 408 U.S. 238, and prohibiting States from imposing grossly excessive punishments on tortfeasors, e.g., Gore, 517 U.S. at 562.*

REASONS FOR GRANTING THE WRIT

A jury's award of punitive damages does not constitute a finding of fact.Punitive damages are private fines intended to punish the defendant and deter future wrongdoing. Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendant's wrongful conduct. A jury's assessment of punitive damages is essentially an expression of its moral condemnation. It is well settled under the decisions of the Supreme Court of the United States that when passing upon the constitutionality challenge of punitive damage awards, such awards must be reviewed *de novo* on appeal.

The issue in this case is whether the Indiana Supreme Court applied the wrong standard of review in considering the constitutionality of punitive damages awarded against Appellant Robert Montgomery, under an *abuse-of-discretion standard*. A private fine awarded as punitive damages is intended to punish the defendant and to deter future wrongdoing. The denial of Appellant's Petition to Transfer and allowing the Judgment of the Court of Appeals to stand in considering a constitutional standard as to excessiveness, under a wrong standard of review, warrants review because it presents unresolved and recurring issues of national importance over which there is conflict and confusion when punitive damage awards are not reviewed de novo on appeal. An *abuse-of discretion* standard does not consider whether a $1,640,000.00 punitive damages award was excessive and grossly disproportional to the gravity of any offense committed where the record on appeal was barren of malice or reprehensibility, and is an amount that is 109+ times greater and bore no reasonable relationship to the $15,000.00 compensatory damages previously awarded in a case not involving personal injury or death.

The parameters of excessive punitive damages were clearly delineated in the intervening decision of this Court in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* entered on May 14, 2001. Robert Montgomery's Petition for Transfer was filed on February 21, 2001, and was pending before the Indiana Supreme Court on July 18, 2001 when it was denied. This Court in giving guidance as to the review of excessiveness of

punitive damages and severity of the penalty that a state may impose, re-visited *BMW v. Gore*, where it had previously said:

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

Punitive damages have been described as "quasi criminal" and when enforced judicially by state courts as "private fines" become state imposed. Robert Montgomery did not receive any fair notice that a penalty by way of private fine in the amount of $1,640,000.00 could, and would be visited upon him at a punitive damages hearing held solely to determine his wealth, wholly unrelated to compensatory damages of $15,000.00 previously awarded, for being involved as a corporate officer in a law suit that was filed by Executive Builders, Inc. against G. Raymond Trisler on advice of legal counsel, who drafted, signed and filed the Complaint.

THE ISSUES ARE RECURRING AND OF CONSIDERABLE PUBLIC IMPORTANCE

The use of compensatory damages as a calibrating factor has a long history dating back at least 700 years. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 581 (1996). In *BMW v. Gore*, this Court analyzed each of the factors to be applied in considering an award of punitive damages under three (3) tests laid down, (517 U.S. at 574), and concluded in that case that:

> First, the degree of reprehensibility was not great;
>
> Second, there was no reasonable relationship between the punitive damage award and the compensatory damage award; and
>
> Third, the civil penalties for similar misconduct were far lower.

In the wake of BMW v, Gore, other federal and state appellate courts began a *"BMW"* analysis of punitive damage

awards, focusing on the ratio between compensatory damages and punitive damages. Four (4) states, Alabama, Alaska, North Carolina, and Ohio added punitive damage caps. (Footnote 6, Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 149 L.Ed.2d at p. 685), and in 1998, Indiana capped and limited under IND.CODE Sec. 34-51-3-4, eff. July 1, 1998 to no more than *"three times the compensatory damages or $50,000 whichever is greater"* See also: *Federal: Watkins v. Lundell,* 169 F.3rd 540 (8th Cir. 1999), *cert. denied,* U.S. , 120 S.Ct . 324 (1999) (punitive damages of $3,500,000 based on actual damages of $235,000 set aside as constitutionally excessive; award should not exceed a 4 to 1 ratio); See: *Federal deposit Insurance Corp. v. Hamilton,* 122 F.3rd 854 (10th Cir. 1997) (compensatory damages of $44,000, punitive damages of $1,200,000 reduced on appeal to $264,000, applying *BMW*).

None of these three factors were applied by the Indiana Supreme Court or the Indiana Court of Appeals who applied the wrong abuse-of-discretion standard of review in considering the constitutionality challenge of the punitive damages award in this case which was raised on appeal and acknowledged by the Court of Appeals.****[1].

In Indiana, a ratio of 7 to 1 was approved in *Coachmen's Industries, Inc. v. Dunn,* 719 N.E.2d 1271, 1278, (Ind.App. 1999) cited and relied upon by the Court of Appeals in *Executive Builders, Inc. v. Trisler,* (supra), pp. 360-361). The Court in the *Dunn* Decision decided that an award of punitive damages may violate the due process clause under the federal Constitution, and noted in 1999 at that time, that:

> *". . .the U.S. Supreme Court has declined to establish a single test for determining whether an award of punitive damages violates [due process under] the Constitution,"* citing: *Michigan Mutual Insurance Company v. Sports, Inc.* 698 N.E.2d 834, 842-43 (Ind.App. 1999) *trans denied,* 706 N.E.2d 555 (Ind. 1999).

---

[1] The Court of Appeals in *Executive Builders, Inc. v. Trisler,* (Appendix hereto) reported at 741 N.E. 2d 351, (Ind.Ct.App. 2000) at 360 said: "Moreover, Robert [Montgomery] maintains that the award violated his rights to due process under the United States Constitution and Indiana Constitution in that the amount awarded was impermissibly excessive."

The amount of the punitive damages in question cannot be constitutionally resolved under an abuse-of-discretion standard applied by the Courts below. Constitutional challenge of excessive punitive damages can only be resolved on a case-to-case basis by *de novo* review on appeal. There is great disparity between the harm allegedly suffered by Ray Trisler and the $1,640,000.00 punitive damages approved by the Court of Appeals under a wrong standard of review. Ray Trisler testified in the record on appeal that he suffered only *"mental anguish – all types"* as to which he never incurred any medical expenses for medication or for treatment. (Appellant's Brief, p. 42). Trisler incurred no other expenses and suffered no monetary losses. There is no probative evidence as can objectively support his claim of *"mental anguish - all types."* The record is totally barren of any evidence that will in any way support a punitive damages award of $1,640,000.00 as either fair or reasonable compensation. As stated by the Texas Supreme Court *". . . juries could not simply pick a number and put in the blank" . . . "there must be evidence that the amount found is fair and reasonable compensation."* in *Saenz. Fidelity Guaranty Ins. Underwriters*, 925 S.W.2d 607 (Tex. 1996). *reh. overruled*, (Appellant's Brief, p. 42).

The difference between the award of $1,640,000.00 awarded in this case, and the awards imposed in comparable cases involve constitutional challenges that merit *de novo* review. The broad legal comparison is better suited to the expertise of appellate courts under the heightened scrutiny of *de novo* review which can compare awards to other litigants similarly situated involving the identical conduct. The conduct here was the filing or maintaining of an alleged frivolous lawsuit, that was never adjudicated frivolous by the trial court.

Similar awards in comparable cases are sanctioned by payment only of attorneys fees and expenses incurred, awarded against offending parties, and ordered to be paid by the court, upon a finding that such suit was filed or maintained frivolously, and there is no such finding in the record here. The dollar amount for attorneys fees and costs to defend a frivolous lawsuit must be fair and reasonable, and an award of $1,640,000.00 is neither fair nor reasonable.

The Decisions Below Affirm a Judgment of the Court of Appeals that does not Give Notice, Nor Define what acts are Punishable under any Readily Ascertainable Standard of Criminality or Guilt.

The wide variability of punitive damages awarded throughout the United States by State trial courts, reflect a great inconsistency when such awards are not calibrated by a State Court of Appeals under a *de novo* standard of review to a common scale in many states. In many States, punitive damage awards are calibrated and limited to no more than 3 to 4 times punitive damages. Punitive damages are *"an expression of moral condemnation"* and are to be limited to an amount necessary to deter, and to punish. Punitive damages should never be added to any sum previously awarded as compensatory damages. The award of punitive damages necessarily contains an element of arbitrariness on the part of the jury where a number is filled into a blank space provided for it. The jury in this case filled in the blank at 109+ times more than the $15,000.00 compensatory damages it awarded the previous day that bore no relationship to the punitive damages. The only evidence at the punitive damages hearing consisted of determining the personal [gross, not net wealth] of Robert Montgomery and the request for the jury to award punitive damages in the nature of a "10% "tithe" as additional compensation.

The civil lawsuit filed for business interference against G. Raymond Trisler, was signed and filed by legal counsel admitted to practice law in Indiana, who prepared, signed and filed the Complaint. Appellant raised the question before the Court of Appeals, (Appellant's Brief, p. 33) that *". . .acting on advice of counsel is a complete defense to an action for malicious prosecution of either civil or criminal actions. . ."* The punitive damages fine of $1,640,000 was meted out under penal provisions that did not define any wrongful act to be punished, was indefinite and vague, and afforded no ascertainable standard of reprehensibility, or gave notice of what acts were punishable by private fine that would be enforced by the judicial branch of the state government.

Unlike the Petitioner in *Browning-Ferris Industries of Vermont, Inc., v. Kelko Disposal, Inc., et. al.*, 492 U.S. 257, 109 S.Ct. 2909,

106 L.Ed.2d 219, (1989) where this Court held the excessive fine clause of the 8th Amendment inapplicable to punitive damage awards between private parties, 492 U.S., at 276-277, 109 S.Ct. 2909, 106 L.Ed.2d 219, Robert Montgomery raised the constitutional issue of an 8th Amendment excessive fine, as a violation of the 14th Amendment because of the grossly excessive size of the punitive damages that violated his rights under the due process clause of the 14th Amendment on substantive grounds, which was raised before the trial court, the Indiana Court of Appeals and the Indiana Supreme Court. (Appellant's Brief, p. 40, Appendix).

Neither the Indiana Court of Appeals, nor the Supreme Court of Indiana applied *de novo*, the *"highly deferential"* standard required under *BMW v. Gore*.

First, the *"degree of reprehensibility"* was not great. [Here the mere filing of a civil law suit, filed by Appellant's Attorneys against G. Raymond Trisler cannot support any claim of malice]; Second, *"there was no reasonable relationship between the punitive damage award and the compensatory damage award"*. [Here, the punitive damages award of $1,640,000 is 109+ times the $15,000 compensatory damages award, which was ordered paid exclusively to G. Raymond Trisler as additional compensatory damages], and bears no reasonable relationship to any alleged misconduct; and Third, *"the civil penalties for similar misconduct are far lower"*. [Here, Indiana Statute imposed Sanctions against offenders to pay attorneys fees and expenses incurred in defending or maintaining a frivolous lawsuit] that are minuscule by comparison.

The Supreme Court of California in *Jeffrey Lane, et. al. v. Hughes Aircraft Company*, 22 Cal.4th 405, (CA 2000) reversed the Judgment of the Court of Appeals of the Ninth Circuit in that case upon the ground that the Court of Appeals for the Ninth Circuit did not apply the highly deferential standard required under *BMW v. Gore*.

THE DECISIONS BELOW ARE UNMISTAKABLY INCORRECT

The Supreme Court of Indiana on July 18, 2001 allowed the Judgment of the Court of Appeals of December 6, 2000 as corrected on December 14, and December 20, 2000 to stand, and did not apply the highly deferential standard required under the principle of *stare decisis* under the intervening decision of the Supreme Court of the United States on May 14, 2001 that required that punitive damages be reviewed under a *de novo standard* in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* 532 U.S.__, 121 S.Ct. 1678, 149 L.Ed.2d 674, (2001) which judicial precedent was called to the attention of the Indiana Supreme Court.

Counsel on August 20, 2001 pursuant to Indiana Appellate Rule 58(B) filed a "MOTION TO RECONSIDER DENIAL OF TRANSFER" and specifically addressed the flawed decision of the Court of Appeals that affirmed a punitive damages award ratio of 109+ to 1 in violation of Robert Montgomery's constitutional rights against excessive fines and cruel and unusual punishment guaranteed to him under the 8th Amendment made applicable to the States under the 14th Amendment to the United States Constitution. To the Motion for Reconsideration was attached a summary copy of the Supreme Court of the United States decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.* decided on May 14, 2001.

Appellant on appeal raised and relied upon *BMW v. GORE*, 517 U.S. at 562, that the three criteria *(1) the degree of defendants reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendants actions; and (3) the sanctions imposed in other cases for comparable misconduct"* (*BMW v. Gore*, pp. 575-585). In applying such criteria to the facts of this case on de novo review, the punitive damages award of $1,640,000 at 109+ times more than the $15,000 compensatory judgment is excessive and should be vacated in its entirety.

On August 20, 2001 Appellant filed his Motion to Reconsider such DENIAL OF TRANSFER (Appendix hereto) and urged the Supreme Court of Indiana to correct the flawed

judgment of the Court of Appeals and the excessiveness of the $1,640,000 punitive damages award. The Indiana Supreme Court for "procedural reasons" refused to review de novo the merits of the case which made the Judgment of the Indiana Supreme Court and the Judgment of the Court of Appeals unmistakably incorrect.

The United States Supreme Court should summarily reverse on the merits, the Judgments of the Courts below.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

Robert L. Montgomery
1800 N. Meridian St., Apt. 502
Indianapolis, Indiana 46202
Telephone (317) 554-6370
Telecopier FAX (317) 554-6208

PRO SE

APPENDICES

APPENDIX TABLE OF CONTENTS

		Page
Appendix A:	Order of the Supreme Court of Indiana entered and Filed on July 18, 2001 Denying Transfer	1a
Appendix B:	Order of the Supreme Court of Indiana entered and filed on August 31, 2001 denying Motion to Reconsider Denial of Transfer	3a
Appendix C:	Motion to Waive Appellate Rule 58(B) and to Permit Filing of Appellant's Motion to Reconsider Denial of Transfer	5a
Appendix D:	Robert L. Montgomery's Petition to Transfer to the Indiana Supreme Court filed February 21, 2001	15a
Appendix E:	G. Raymond Trisler's Brief in Response to Robert Montgomery's Petition to Transfer	32a
Appendix F:	Robert L. Montgomery's Reply for Transfer to the Supreme Court	49a
Appendix G:	December 14, 2001 Corrected Decision of Indiana Court of Appeals	55a
Appendix H:	Montgomery's Appellant's Brief in Court of Appeals, Excerpts, pp. 30, 40-41 ...	75a

APPENDIX A

CLERK

SUPREME COURT, COURT OF APPEALS, AND TAX COURT

STATE OF INDIANA

217 STATE HOUSE, INDIANAPOLIS, IN 46204
317-232-1930 * FAX 317-232-8363

Brian Bishop
Clerk

MICHAEL SIMMONS
SUITE 400
54 MONUMENT CIRCLE
INDIANAPOLIS, IN 46204

Cause Number
73A01-0001-CV-00030
Lower Court Number:
73C018803CP57

EXECUTIVE BUILDERS, ET.AL. -V- TRISLER, G. RAYMOND

You are hereby notified that the SUPREME COURT has on this day 7/18/01

THIS MATTER COMES BEFORE THE INDIANA SUPREME COURT ON A PETITION TO TRANSFER FROM A DECISION OF THE COURT OF APPEALS, PURSUANT TO INDIANA APPELLATE RULE 57. THE COURT HAS REVIEWED THE DECISION OF THE COURT OF APPEALS, THE RECORD OF PROCEEDINGS, THE BRIEFS WHICH WERE FILED IN THE COURT OF APPEALS, AND THE MATERIALS WHICH WERE SUBMITTED IN CONNECTION WITH THE REQUEST TO TRANSFER JURISDICTION. EACH PARTICIPATING MEMBER OF THE COURT HAS VOTED ON THE CASE. EACH PARTICIPATING MEMBER OF THE COURT HAS HAD THE OPPORTUNITY TO VOICE THAT JUSTICES VIEWS ON THE APPEAL IN CONFERENCE WITH THE OTHER JUSTICES.

BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER.

** ROBERT MONTGOMERY **
RANDALL T. SHEPARD, CHIEF JUSTICE

ALL JUSTICES CONCUR

KM

WITNESS my name and the seal of said Court, this 18TH day of JULY, 2001

Brian Bishop

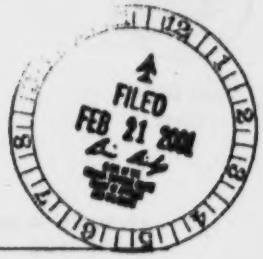
BEST AVAILABLE COPY

ORIGINAL

IN THE

SUPREME COURT OF INDIANA

CAUSE NO.



EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellants/Plaintiffs v.	)	COURT OF APPEALS No. 73A01-0001-CV-30 Lower Court CAUSE NO. 73C01-8803-CP-057

I, Brian Bishop, Clerk of the Indiana Supreme Court, do hereby certify, pursuant to Ind. Code 33-5-40-41, that the foregoing is a full, true, complete and correct copy of the original Order as the same appears upon the record of said Court, and in my custody as Clerk.

In testimony whereof I have subscribed by name and affixed the seal of said Court this 9th day of Oct., 2001.

Brian Bishop Clerk

By M. Schellenka Deputy

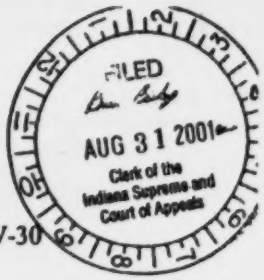
ORDER

Petition to Transfer is hereby DENIED this 18th day of July, 2001

CHIEF JUSTICE

All Justices concur.

APPENDIX B



IN THE INDIANA SUPREME COURT

EXECUTIVE BUILDERS, INC., et al.,	)	Court of Appeals
	)	cause no. 73A01-0001-CV-30
appellants,	)	
v.	)	
	)	
G. RAYMOND TRISLER,	)	
	)	
appellee.	)	

ORDER

The Court of Appeals issued its opinion in this appeal on December 6, 2000. *See Executive Builders, Inc. v. Trisler*, 741 N.E.2d 351 (Ind. Ct. App. 2000). On February 21, 2001 the appellants filed a petition seeking transfer of jurisdiction to this Court. The matter was fully briefed and transmitted to the Court on April 2, 2001. By order dated July 18, 2001, this Court denied transfer of jurisdiction over the appeal, all Justices concurring. On May 14, 2001, while the transfer petition was still pending before this Court, the U.S. Supreme Court issued its opinion in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001).

On August 20, 2001, the appellants filed, by counsel, a "Motion To Waive Appellate Rule 58(B) And To Permit Filing Of Appellant's Motion To Reconsider Denial Of Transfer." In sum, appellants ask that the Court's rule prohibiting the reconsideration of the denial of transfer be waived so that the Court might reexamine the appeal in light of the *Cooper Industries* opinion. In response, the appellee has filed "Appellee's Response To Appellants' Motion To Reconsider Denial Of Transfer; And Motion For Sanctions" and has also filed an "Appendix To Appellee's Response To Appellants' Motion To Reconsider Denial Of Transfer; And Motion For Sanctions."

Inasmuch as the *Cooper Industries* opinion was issued over two months before the Court denied transfer, the pending motion asking for a waiver of a Court rule was unnecessary. The existing rules permitted appellants to bring the case to the Court's attention. *See* Ind. Appellate Rule 48 and Former Appellate Rule 8.4(B) (permitting citation of additional authorities after the briefing has been completed). The fact that appellants did not avail themselves of existing procedural avenues does not justify waiving other procedural rules. The "Motion To Waive Appellate Rule 58(B) And To Permit Filing Of Appellant's Motion To Reconsider Denial Of Transfer" is dismissed. The appellee's motion for sanctions is denied.

CL505RT HISTORY LISTING FOR CASE NO. 73A01- 1-CV-00030 PAGE 5
10/05/01 EXECUTIVE BUILDERS, ET.AL. -V- TRISLER, G. RAYMOND
Lower Cause Number: 73C018803CP57

File Date		
	APPEAL IN CONFERENCE WITH THE OTHER JUSTICES. BEING DULY ADVISED, THE COURT NOW DENIES THE APPELLANT'S PETITION TO TRANSFER. ** ROBERT MONTGOMERY ** RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR	KM
7/18/01	****** ABOVE ENTRY MAILED ******	
7/18/01	**********OPINION CERTIFIED**********	
7/24/01	**********RECEIPT RETURNED**********	RS
8/20/01	APPELLANT'S MOTION TO WAIVE APPELLATE RULE 58(B) AND TO PERMIT FILING OF MOTION TO RECONSIDER DENIAL OF TRANSFER (6) CERTIFICATE OF SERVICE (2) MAIL	MP
8/24/01	APPELLEE'S RESPONSE TO MOTION TO RECONSIDER DENIAL OF TRANSFER (8) APPENDIX (9) CERTIFICATE OF SERVICE (2) MAIL	KB
8/31/01	ISSUED THE ENCLOSED ORDER:	
8/31/01	ORDER: THE "MOTION TO WAIVE APPELLATE RULE 58(B) AND TO PERMIT FILING OF APPELLANT'S MOTION TO RECONSIDER DENIAL OF TRANSFER" IS DISMISSED. THE APPELLEE'S MOTION FOR SANCTIONS IS DENIED. RANDALL T. SHEPARD, CHIEF JUSTICE ALL JUSTICES CONCUR IN THE DISMISSAL OF THE APPELLANTS' MOTION. ALL JUSTICES CONCUR IN THE DENIAL OF SANCTIONS EXCEPT SHEPARD, C.J., WHO WOULD GRANT AN AWARD TO THE APPELLEE OF THE ATTORNEY FEES INCURRED IN DEFENDING THE MOTION.	KM
9/04/01	****** ABOVE ENTRY MAILED ****** **** END OF REPORT ****	

I, Brian Bishop, Clerk of the Indiana Supreme Court, do hereby certify, pursuant to Ind. Code 33-5-40-41, that the foregoing is a full, true, complete and correct copy of the original docket sheet as the same appears upon the record of said Court, and in my custody as Clerk.

In testimony whereof I have subscribed by name and affixed the seal of said Court this 5th day of Oct., 2001

Brian Bishop Clerk

By M. Scheloske Deputy

APPENDIX C

IN THE

SUPREME COURT OF INDIANA

CAUSE NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellant/Plaintiffs v. G. RAYMOND TRISLER, Appellee/Defendant	COURT OF APPEALS No. 73A01-0001-CV-30 Lower Court CAUSE NO. 73C01-8803-CP-057 Shelby Circuit Court Honorable Charles O'Connor Judge

MOTION TO WAIVE APPELLATE RULE 58(B) AND TO PERMIT FILING OF APPELLANT'S MOTION TO RECONSIDER DENIAL OF TRANSFER

Appellant Robert L. Montgomery, by Counsel moves the Court in the interest of justice to waive Appellate Rule 58(B) and to Reconsider DENIAL OF TRANSFER entered on July 18, 2001. The effect of the Denial of Transfer was to let stand a Judgment of the Court of Appeals that affirmed an unconstitutional punitive damage award of $1,640,000 against Robert Montgomery in addition to the $15,000 compensatory damages previously awarded against him which was in violation of Robert Montgomery's 8th Amendment constitutional rights against excessive fines and cruel and unusual punishment.

The trial court entered judgment on compensatory verdicts returned by the jury in the amount of $143,240.00 against Executive Builders, Inc.; $20,000 against Dolores Montgomery; and $15,000 against Robert L. Montgomery during the first phase of the trial. . . "*And thereafter a hearing was held on the issue of punitive damages.*" (Decision of Court of Appeals, at p. 5). The Punitive Damages Award of $1,640,000 was 109 times greater than the prior compensatory damages award.

The Judgment of the lower court was reviewed by the Court of Appeals under an erroneous "*abuse of discretion*" standard, that declared that ". . .*this Court indulges in every reasonable presumption in favor of legality of the jury's verdict*, . ." (Decision, p. 5), and at p. 15 of its Decision at Point "G" discussed punitive damages, and rejected Robert Montgomery's claim that the award of $1,640,000 ". . .*violated his rights to due process under the United States Constitution and Indiana Constitution in that the amount awarded was impermissibly excessive.*" The punitive damages award was affirmed based upon " . .*the probative evidence and reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility*" from which the Court of Appeals concluded that . . .*a judgment that is a product of fair procedures is cloaked with a strong presumption of validity.*" The Court of Appeals thus concluded that a punishment fine of $1,640,000 for tortiously filing a lawsuit against Appellee was not excessive, and did not offend the 14th Amendment's Due Process Clause that made the 8th Amendment prohibition against excessive fines and cruel and unusual punishment applicable to the states. The Court of Appeals based its Decision as stated at p. 16, on three guideposts it erroneously applied to the evidence presented during the punitive damages phase of the trial that finding such fine was not grossly excessive, to wit:

1) the degree of reprehensibility of the conduct at issue;

2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received; and

3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases.

The correct standard of a *de novo* review mandated by the United States Supreme Court to be applied in a review of punitive damages was not applied by the Court of Appeals. The United States Supreme Court granted Certiorari to review a similar decision reached by the Ninth Circuit Court of Appeals who did not apply a *de novo* standard of review on appeal and reversed its Judgment on May 14, 2001 solely because it failed to apply a *de novo* review of appeal standard to punitive damages in the case of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, ____U.S.___, _____S.Ct._____, __ L.E.2d_____, (2001). The Court vacated and reversed the Judgment of that Court of Appeals (reported at 205 F.3rd 1351), holding that the Ninth Circuit Court of Appeals erred in not applying a *de novo* standard in reviewing the district trial court's determination of the constitutionality of punitive damages awarded. The Ninth Circuit in applying the less demanding abuse of discretion standard, as did the Indiana Court of Appeals here, erred.

The Court by *Stevens, J* delivered the opinion of the Court in which *Rehnqist, C.J. and O'Connor, Kennedy, Souter, Thomas, and Breyer JJ,* joined. *Thomas J.* filed a concurring opinion. *Scalia, J.* filed an opinion concurring in the judgment. *Ginsburg. J.* filed a dissenting opinion. The Court in nearly unanimity reviewed the Ninth Circuit Court of Appeals rejection of *BMW of North America, Inc. v. Gore*, 517 U.S. 599 and held

it to be in error. The Court said:

> ***(a) Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendant's wrongful conduct, but punitive damages are private fines intended to punish the defendant and deter future wrongdoing.***
>
> ***A Jury's determination of the former is essentially a factual determination, but its imposition of the latter is an expression of its moral condemnation. States have broad discretion in imposing criminal penalties and punitive damages. . .However, the Fourteenth Amendments due process clause imposes substantive limits on the States discretion, making the Eight Amendments prohibition against excessive fines and cruel and unusual punishments applicable to the states. Furman v. Georgia, 408 U.S. 238, and prohibiting States from imposing grossly excessive punishments on tortfeasors, e.g. Gore, 517 U.S., at 562.***

A copy of the first two (2) pages of the Supreme Court's Decision in *Cooper Industries, Inc.* is attached hereto for convenience of the Court that shows that the Court in near unanimity, reviewed the Ninth Circuit's rejection of *BMW of North America, Inc. v. Gore*, 517 U.S. 599 and held it to be reversible error.

The Indiana Court of Appeals, on the same grounds as did the Ninth Circuit, rejected *BMW. of North America, Inc. v. Gore*, which was an issue on appeal raised by Robert Montgomery in APPELLANT'S BRIEF, as POINT "D", and sub-points 1 and 2, recited at pages 40 and 41 of APPELLANT'S BRIEF filed on July 3, 2000, which for convenience of the Court is re-quoted from Appellant's Brief in pertinent part:

"D

> **The punitive damages award of $1,640,000 against Robert Montgomery is so gross, and bears no reasonable relationship to any personal or economic injury, that it cannot be rationally explained other than prejudice, passion, or other improper element on the part of Jury which requires that it be set aside."**

Point I.

"The Supreme Court of the United States in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) held that the size of the award in that case was such that the result violated the due process clause of the Fourteenth Amendment on substantive grounds, and said that *punitive damage awards must be reviewed for excessiveness on due process grounds.* (517 U.S. at 568). Robert Montgomery urged the Court of Appeals to consider that:

> ***Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.***

Robert Montgomery cannot believe that simply being involved in a law suit filed by Executive Builders, Inc. on advice of counsel, against Appellee, G. Raymond Trisler would subject him to a penalty of $1,640,000. The penalty in Indiana for malicious filing of a lawsuit, which this was not, is sanctioned by Statute that requires payment of attorneys fees and expenses to the injured party. The Jury's verdict of $15,000 constituted payment of substantial attorneys fees and costs not that were never paid by Trisler but were paid by his Liability Insurance Company.

The Court in *BMW of North America, Inc. v. Gore*, analyzed each of the factors it set down and set down three (3) tests [all of which are applicable to the facts of this case], (517 U.S. at 574), saying:

> ***First, the degree of reprehensibility was not great;***
>
> ***Second, there was no reasonable relationship between the punitive damage award and the compensatory damage award; and***
>
> ***Third, the civil penalties for similar misconduct were far lower.***

In the wake of *BMW*, both federal and state appellate courts began a *"BMW"*

analysis of trial court punitive damage awards. Most opinions focus on the ratio between compensatory damages and punitive damages. *Federal: Watkins v. Lundell*, 169 F.3rd 540 (8th Cir. 1999), *cert. denied*, __U.S._, 120 S.ct. 324 (1999) (punitive damages of $3,500,000 based on actual damages of $235,000 set aside as constitutionally excessive; award should not exceed a 4 to 1 ratio); *Federal deposit Insurance Corp. v. Hamilton*, 122 F.3rd 854 (10th Cir. 1997) (compensatory damages of $44,000, punitive damages of $1,200,000 reduced on appeal to $264,000, applying *BMW*); Alabama: *BMW of North America, Inc. v. Gore*, 701 N.E.2d 507 (Ala. 1997) (reduced $2,000,000 punitive damages award to $50,000);. . "

In *Cooper Industries* (*infra*), the Court granted Certiorari to decide whether the Court of Appeals for the Ninth Circuit reviewed the ". . .*constitutionality of the punitive damages award under the correct standard and also whether the award violated the criteria we articulated in Gore*. . . .*and we now conclude that constitutional issue merits de novo review.*" The Court said that Punitive damages are quasi-criminal as private fines intended to punish the defendant and to deter wrongdoing, (p. 5) and said:

> *Punitive damages are not compensation for injury. . .A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damage is an expression of its moral condemnation. . . Punitive damages are specifically designed to exact punishment in excess of actual harm to make clear that the defendants misconduct was especially reprehensible.*

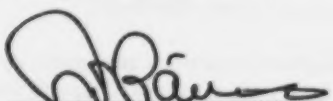
Punitive damages here were awarded to G. Raymond Trisler as additional compensation for his alleged injuries in violation of the public policy of the State of Indiana expressed by Statute that limited punitive damages to a three to 1 ratio that was in effect during trial and not applied by the Court of Appeals. Indiana by that statute, put a three to one cap on all punitive damages based on compensatory damages in this State,

and came in line with sister States who similarly had capped punitive damages, in Connecticut, Delaware, Florida, Illinois, Nevada, North Dakota, Oklahoma and Texas. (See *BMW of North America, Inc. v. Gore*, (supra), 517 U.S. at pp. 615, 616 (appendix to dissenting Opinion of *Ginsburg, J.*).

In other states, such as Georgia, the Court of Appeals in *H & H Subs, inc. v. Lim*, 478 S.E.2d 632, (Ga.App. 1996), held that it was error to admit evidence of attorneys fees and litigation expenses during the punitive phase of trial as such evidence related to compensation and was not probative of any proper basis on which punitive damages could be awarded. The trial court allowed the jury during the punitive damages phase of the case to award punitive damages based on the attorneys fees and litigation expenses that related to the law suit filed by Executive Builders, Inc. against Trisler.

For all of the above reasons, Robert Montgomery requests the Supreme Court to Waive Appellate Rule 58(B) and permit the filing of his Motion to Reconsider Denial of Transfer, and to vacate, the Judgment of the Court of Appeals filed on December 6, 2000 who applied the wrong standard on appeal of this case from the trial court, in affirming an excessive Punitive Damage Award of $1,640,000.00 against Robert Montgomery. This cause should be remanded to the Court of Appeals for a correct review under a *de novo* standard in conformity with the law of the land as mandated by the United States Supreme Court, and for all other appropriate relief.

Respectfully submitted,



John D. Raikos No. 5896-49

FindLaw | Legal Professionals | Students | Business | Public | News E-mail@Ju

FindLaw
Laws - Cases, Codes & Regs

Cases & Codes | Forms | Legal Subjects | Federal | State | Library | Boards Law Firm FirmSit

Lawyer Search City or ZIP Select a State Select a Practice Area

FindLaw: Laws: Cases and Codes: SUPREME COURT Opinions

Search US Supreme Court

Email a Link to This Case
http://laws.findlaw.com/us/000/99-2035.html

Jump to: [Opinion] [Concurrence 1] [Concurrence 2] [Dissent]

COOPER INDUSTRIES, INC. *v.* LEATHERMAN TOOL GROUP, INC.

certiorari to the united states court of appeals for the ninth circuit

No. 992035. Argued February 26, 2001Decided May 14, 2001

Respondent Leatherman Tool Group, Inc., manufactures a multifunction tool which improves on the classic Swiss army knife. When petitioner Cooper Industries, Inc., used photographs of a modified version of Leathermans tool in posters, packaging, and advertising materials introducing a competing tool, Leatherman filed this action asserting, *inter alia*, violations of the Trademark Act of 1946 (Lanham Act). Ultimately, a trial jury awarded Leatherman $50,000 in compensatory damages and $4.5 million in punitive damages. Rejecting Coopers arguments that the punitive damages were grossly excessive under *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, the District Court entered judgment. As relevant here, the Ninth Circuit affirmed the punitive damages award, concluding that the District Court did not abuse its discretion in declining to reduce that award.

Held: Courts of Appeals should apply a *de novo* standard when reviewing district court determinations of the constitutionality of punitive damages awards. The Ninth Circuit erred in applying the less demanding abuse-of-discretion standard in this case. Pp. 618.

(a)Compensatory damages redress the concrete loss that a plaintiff has suffered by reason of the defendants wrongful conduct, but punitive damages

FindLaw Newsletters

Daily Opinion SUMMARIES FREE Supreme Court

Only at FindLaw 1st Circuit

MY FindLaw

FREE CALIFORNIA CASE LAW

FindLaw Newsletters

Top Legal News Headlines
Legal Grounds
Labor & Employment Law

Your email

Subscribe

More Newsletters

MY FindLaw
Email:
Password:
Keep me logged in until I sign out.
Sign In
Forgot Your Password ? click here!
New User ? Click Here!

are private fines intended to punish the defendant and deter future wrongdoing. A jurys assessment of the former is essentially a factual determination, but its imposition of the latter is an expression of its moral condemnation. States have broad discretion in imposing criminal penalties and punitive damages. Thus, when no constitutional issue is raised, a federal appellate court reviews the trial courts determination under an abuse-of-discretion standard. *Browning-Ferris Industries of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 279. However, the Fourteenth Amendments Due Process Clause imposes substantive limits on the States discretion, making the Eighth Amendments prohibition against excessive fines and cruel and unusual punishments applicable to the States, *Furman* v. *Georgia*, 408 U.S. 238, and prohibiting States from imposing grossly excessive punishments on tortfeasors, *e.g.*, *Gore*, 517 U. S., at 562. The cases in which such limits were enforced involved constitutional violations predicated on judicial determinations that the punishments were grossly disproportional to the gravity of the offense. *E.g.*, *United States* v. *Bajakajian*, 524 U.S. 321, 334. The relevant constitutional line is inherently imprecise, *id.*, at 336, but, in deciding whether that line has been crossed, this Court has focused on the same three criteria: (1) the degree of the defendants reprehensibility or culpability; (2) the relationship between the penalty and the harm to the victim caused by the defendants actions; and (3) the sanctions imposed in other cases for comparable misconduct. See, *e.g.*, *Gore*, 517 U. S., at 575585; *Bajakajian*, 524 U. S., at 337, 339, and 340343. Moreover, and of greatest relevance for the instant issue, in each case the Court has engaged in an independent examination of the relevant criteria. See, *e.g.*, *id.*, at 337344; *Gore*, 517 U. S., at 575586. The reasons supporting the Courts holding in *Ornelas* v. *United States*, 517 U.S. 690, that trial judges reasonable suspicion and probable cause determinations should be reviewed *de novo*that reasonable suspicion and probable cause are fluid concepts that take their substantive content from the particular contexts in which the standards are being expressed; that, because such concepts acquire content only through case-by-case application, independent review is necessary if appellate courts are to maintain control of, and clarify, legal principles; and that *de novo* review tends to unify precedent and stabilize the laware equally applicable when passing on district court determinations of the constitutionality of punitive damages awards. Pp. 612.

(b)Because a jurys award of punitive damages is not a finding of fact, appellate review of the District Courts determination that an award is consistent with due process does not implicate the Seventh Amendment concerns raised by Leatherman and its *amici*. Pp. 1216.

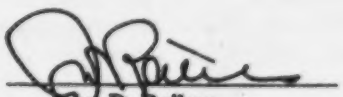
(c)It seems likely in this case that a thorough, independent review of the District Courts rejection of Coopers due process objections to the punitive damages award might have led the Ninth Circuit to reach a different result. In fact, this Courts own consideration of the three *Gore* factors reveals questionable conclusions by the District Court that may not survive *de novo* review and illustrates why the Ninth Circuits answer to the constitutional question may depend on the standard of review. Pp. 1618.

205 F.3d 1351, vacated and remanded.

Stevens, J., delivered the opinion of the Court, in which *Rehnquist, C.J.*, and *OConnor, Kennedy, Souter, Thomas*, and *Breyer, JJ.*, joined. *Thomas, J.*, filed a concurring opinion. *Scalia, J.*, filed an opinion concurring in the judgment. *Ginsburg, J.*, filed a dissenting opinion.

WORD COUNT CERTIFICATE

I verify under penalties for Perjury that this Motion to Waive Appellate Rule 58(B) and to Permit Filing of Appellant's Motion to Reconsider Denial of Transfer contains 1987 words.



John D. Raikos

CERTIFICATE AND PROOF OF SERVICE

The undersigned certifies a true copy of the foregoing Pleading was served by depositing in the United States Mail, postage prepaid and addressed to:

Michael E. Simmons, Esq.
HUME SMITH GEDDES GREEN & SIMMONS
54 Monument Circle 4th Floor
Indianapolis, Indiana 46204

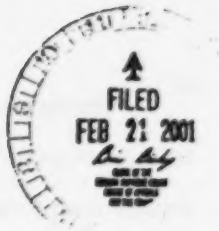
this 20th day of August 2001.

John D. Raikos

John D. Raikos
Attorney at Law
1800 N. Meridian St. Suite 408
Indianapolis, Indiana 46244
Telephone (317) 925-5200
Telecopier FAX (317) 925-5596

ATTORNEY FOR APPELLANT

APPENDIX D



IN THE

SUPREME COURT OF INDIANA

CAUSE NO:

EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellants/Plaintiffs v. G. RAYMOND TRISLER, Appellee/Defendant	)	COURT OF APPEALS No. 73A01-0001-CV-30 Lower Court CAUSE NO. 73C01-8803-CP-057 Shelby Circuit Court Honorable Charles O'Connor, Presiding Judge

ROBERT L. MONTGOMERY'S PETITION TO TRANSFER TO THE SUPREME COURT

John D. Raikes No. 5896-49
Attorney at Law
1800 N. Meridian St. Suite 408
P.O. Box 44444
Indianapolis, Indiana 46244
Telephone (317) 925-5200

ISSUE RAISED WARRANTING TRANSFER

The Opinion of the Court of Appeals upheld an excessive sanction, affirming the trial court award of punitive damages in the amount of $1,640,000. The punitive damage award was assessed only against Robert Montgomery, who brings this Petition. Judgment was granted individually against his two co-plaintiffs/counter-defendants and the smallest judgment was assessed against Montgomery. This decision is in conflict with decisions of the Court of Appeals, is in conflict with decisions of this Court and is a significant departure from the accepted law of punitive damages, such as to warrant the exercise of the jurisdiction of Supreme Court of Indiana.

TABLE OF AUTHORITIES

Page

CASES

Budget Car Sales v. Stott, 656 N.E.2d 261, 265, (Ind. 1995) . . 6

Christianburg Garment Co. v. Equal Empl. Opp. Comm., 434 U.S. 412 (1978) 2

Crookston v. Fire Ins. Exch., 817 P.2d 789 (Utah 1991) . . . 6

Michigan Mutual Insurance Company v. Sports, Inc., 698 N.E.2d 834, (Ind.App. 1998), *trfr. denied* 706 N.E.2d 555 (Ind. 1999) 4

Miller Brewing v. Best Beers, 608 N.E.2d 975, 983, (Ind. 1993) 5

Osborne v. Wenger, 572 N.E.2d 1343 (Ind.App.1991) 7

Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct.1032, 113 L.Ed.2d 1, (1991) 7

CONSTITUTIONS

Equal Protection of Law. United States Constitution, Amend. XIV, Sec. 1 8

Equal Protection of Law. Indiana Constitution, Art. 1, Sec. 23 8

Due Process of Law, Ind. Const. Art. 1, Sec. 12, 21, 23 8

STATUTES

IND.CODE Sec. 34-1-32-2-1 5

Indiana Rules of Trial Procedure

IND. TRIAL RULE 12(B) 3

Other Authorities

RES GESTAE, October 1986, 164 . . . . . 5, 6

IN THE

SUPREME COURT OF INDIANA

CAUSE NO.

EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellant/Plaintiffs v. G. RAYMOND TRISLER, Appellee/Defendant	COURT OF APPEALS No. 73A01-0001-CV-30 Lower Court CAUSE NO. 73C01-8803-CP-057 Shelby Circuit Court Honorable Charles O'Connor Judge

ROBERT L. MONTGOMERY'S PETITION TO TRANSFER TO THE SUPREME COURT

I.

BACKGROUND AND PRIOR TREATMENT OF ISSUES ON TRANSFER

The Court of Appeals decided this case by Opinion - For Publication dated December 6, 2000. The Court of Appeals' decision was against the Appellants, one of whom is Robert L. Montgomery, who now seek transfer. A Petition for Rehearing was timely filed with the Court of Appeals on December 27, 2000, which was denied by the Court of Appeals on January 22, 2001. This Petition to Transfer was filed on February 21, 2001.

The trial court's judgment, entered on October 18, 1999, following a jury verdict, awarded punitive damages of $1,640,000 in favor of G. Raymond Trisler, hereinafter referred as Trisler, against Robert L. Montgomery, one of the original plaintiffs and referred to hereinafter as Montgomery.

The punitive award was assessed only against Montgomery and in addition to compensatory damages totaling $178,240. The compensatory damages were allocated $143,240 against Executive Builders, $20,000 against Dolores Montgomery and $15,000 against Robert Montgomery. The compensatory damage awards were also affirmed by the Court of Appeals and are not at issue herein.

II.

ARGUMENT

The trial court did not articulate adequate reason upon which it concluded that a punitive damage award of $1,640,000, more than one hundred nine (109) times the compensatory damages of $15,000 awarded, was not excessive. Further, this amount is contrary to holdings of this Court, the Court of Appeals, and constitutes a violation of the state and federal rights of due process of law.

Executive Builders filed a lawsuit against Trisler on December 11, 1987. This was resolved when the court granted summary judgment in favor of Trisler. Montgomery argues that the award of punitive damages is premised upon his lawsuit against Trisler. The verdict is in the nature of a fine payable in the sum of $1,640,000 to Trisler as additional compensation.

The was no evidence the original lawsuit filed by the Montgomerys and others was frivolous. Trisler testified that he ". . .had no personal knowledge with regard to which acts that Robert Montgomery and/or Dolores were or were not authorized by Executive Builders." (R. 3533, 6-22). The trial court engaged in *post hoc* reasoning, that because Executive Builders did not prevail on appeal, the complaint filed against Ray Trisler was frivolous. Such logic was expressly condemned by the Supreme Court in *Christianburg Garment Co. v. Equal Empl. Opp. Comm.*, 434 U.S. 412, 421-2, (1978),

> . . .that because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success.

The lawsuit against Trisler was filed by Executive Builders on advice of its Counsel Bookwalter & Thomas. The Complaint signed by counsel was admitted in evidence by the trial court. Montgomery testified "he relied on nothing but lawyers." Mr. Loveall, one of Montgomery's attorneys, testified he gave him advice." (R. 3767, 20-21). Allan Zukerman testified that the Complaint was filed only ". . . after we had consulted with our attorney. . ." (R. 2114, 19-25). Such evidence clearly established that Executive Builders filed its lawsuit against Trisler upon advice of counsel.

Counsel for Executive Builders moved the trial court to "have the pleadings conform to the evidence" and requested that the court give a final instruction to the jury so that counsel could argue, that reliance upon legal counsel was a complete defense, and the Court would so instruct the jury. The trial court erroneously concluded that such Motion to conform to the evidence ". . . was an attempt to inject the affirmative defense of counsel which hasn't been pled. . ."

THE COURT: "With respect to the motion to Have the Pleadings conform to the Evidence, I believe that to be an attempt to inject the affirmative defense of advice of counsel which hasn't been pled... so I don't think that a Motion to Conform to the Evidence can take the place of a Trial Rule 12 requirement of pleading an affirmative defense, I will deny the Motion to Have the Pleadings Conform to the Evidence; . . ." (R. 3763, 2-16). The jury was not instructed that advice of counsel was an absolute defense to a claim of bringing frivolous litigation.

THE COURT: ". . . obviously I could be wrong." (R. 3768, 11-23).

After the jury returned verdicts of $15,000 against Robert Montgomery, $143,240.00 against Executive Builders, and $20,000 against Dolores Montgomery, the Appellant filed a

motion for mistrial; to reject the jury verdicts; and for judgment on the evidence in their favor. These motions were denied by the trial court, which ordered the case to proceed to hearing on punitive damages.

No evidence was presented at the punitive damages hearing, regarding Montgomery's conduct against Trisler. The hearing was limited solely to the financial well-being of Robert Montgomery. The trial court's instructions were inadequate to guide the jury in its deliberations.

During summation at the punitive damages hearing, the trial court allowed counsel to argue to the jury that an appropriate punitive damage award against Montgomery should be based on ten percent (10%) of his wealth of his gross estate of sixteen million dollars ($16,000,000), and was a proper award to Trisler for punitive damages as a biblical tithe of ten percent (10%) of the total wealth of Montgomery.

The amount sought was wholly unrelated to any injury, physical harm, or quantified emotional injury claimed to have been suffered by Trisler. Trisler could not specify any dollar amount of damages he suffered, and testified that as a result of being sued by Executive Builders, he suffered only "mental anguish -- all types." (R. 3537-39). Trisler testified he never needed medication, and was never medically treated for "depression or sleeplessness" and could think of "no other injuries." (R. 3531, 14-24; R. 3532, 1-8; R. 3537, 1-22). Moreover he paid absolutely nothing for his defense costs, so he did not suffer economically. (R. 3306, 14-25; R. 3307, 1; Appellant's Brief, p. 16).

The trial court's judgment cannot pass constitutional muster under the required standards that another panel of the Court of Appeals articulated in *Michigan Mutual Insurance Company v. Sports, Inc.*, 698 N.E.2d 834, 842-843 (Ind.App. 1998) *trans. den.* 706 N.E.2d 555 (Ind. 1999). The Court held that excessive punitive damages are violative of due process, unless based upon: ". . .(1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of the award to the actual harm inflicted on the plaintiff; and (3) the comparison of the award and civil penalties authorized or imposed in comparable cases." *Id.* 843-844.

In the words of former Justice Prentice, quoted in *RES GESTAE*, October 1986, 164, at p. 169,

> "*. . . the imposition of punitive damages is tantamount to a criminal fine, and that a defendant is entitled to certain protections . . . that the defendant is entitled to the presumption that his conduct did not reach the level of obduracy necessary to impose punitive damages, and is further entitled to an instruction to the jury to that effect.*"

The Court of Appeals denied the Petition for Rehearing filed by Robert Montgomery. The Court of Appeals refused to vacate or to reduce the punitive damages award of $1,640,000, and opined that Trisler had suffered ". . . nearly six years of sleeplessness, mental anguish, depression and nervousness. . ." This is not consistent with the Record. Trisler testified that he did not suffer any physical injuries, and was never medically treated for either "mental anguish or sleeplessness." His verbatim testimony is in the Record, and was quoted in Appellant's Brief at p. 6. (R. 3531, 16-25; R. 3532, 1-8).

The Record does not support the conclusion that ". . .the evidence at trial demonstrated that Robert [Montgomery] purposely and maliciously orchestrated and financed a false and frivolous cause of action against Trisler." [Opinion p. 17]

The Opinion of the Court of Appeals in affirming the punitive damage award against Robert Montgomery is in conflict with the decision of the Supreme Court in *Miller Brewing v. Best Beers*, 608 N.E.2d 975, 983, (Ind. 1993). Therein, the Court determined that there is no right to punitive damages, and that "punitive damages are not compensatory because in that case the plaintiff has already been awarded damages to compensate him for his loss. . . and anything in addition is a 'windfall.'" Trisler had a complete remedy at law for frivolous litigation proscribed by the Indiana Legislature in IND.CODE Sec. 34-1-32-2-1 in authorizing every trial court to grant,

> ". . . attorneys' fees as part of the costs to the prevailing party where the court finds that either party *has brought a frivolous, unreasonable, or groundless action or defense.* . ." (Emphasis added).

"The nature of an attorney fee under the obdurate behavior exception is punitive, designed to reimburse *a prevailing party* who has been dragged into *baseless litigation* and subjected to great expense." RES GESTAE (supra, p. 166) citing Supreme Court precedents. "As in a punitive damage case, the proponent of the petition for costs and fees should bear the burden of proof. . .The fact that one loses the case does not *ipso facto* mean that the suit was frivolous." RES GESTAE, (supra, p. 170, citing cases).

The Opinion of the Court of Appeals conflicts with another decision of the Court of Appeals in *Budget Car Sales v. Stott*, 656 N.E.2d 261, 265, (Ind. 1995) holding that "the thoughts of benefiting the injured party should be laid aside,"

> ". . .punitive damages awarded in addition to damages which compensate for the specific injury, the injured party 'has already been awarded all that he is entitled to as a matter of law' are a 'windfall', and in making that decision all thoughts of benefiting the injured party should be laid aside and the sole issues are whether or not the Defendant's conduct was so obdurate that he should be punished for the benefit of the general public."

An award of punitive damages that is one hundred nine (109) times more than compensatory damages of $15,000 is contrary to public policy. The Legislature, in adopting the Tort Reform measure, limited punitive damages to "three times the amount of compensatory damages or $50,000 whichever is greater."[1] As the Supreme Court of Utah declared in *Crookston v. Fire Ins. Exch.*, 817 P.2d 789 (Utah 1991), ratios of punitive damages to actual damages sustained if less than 3 to 1 are consistently upheld, but if it exceeds that ratio, ". . .the trial judge is not bound to reduce it. However, if such an award is upheld, the trial judge must make a detailed and reasoned articulation of the grounds for concluding that the award is not excessive in light of the law and the facts."

The Court of Appeals in its Opinion did not make a detailed and reasoned articulation of the grounds for concluding that the award of $1,640,000 was not excessive. This is an important

---

[1]Counsel acknowledges the statute does not apply to this litigation, but argues it is supportive of Montgomery's theory that this award is excessive as a matter of public policy.

question of law, the ruling is in conflict with the opinions of this Court: the Court of Appeals, and should be decided by the Supreme Court.

The Supreme Court in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed.2d 1, (1991) considered the effect of the Due Process Clause on the award of punitive damages. After noting growing concern with excessive awards, the Court said that "unlimited jury discretion—or unlimited judicial discretion for that matter—in the fixing of punitive damages may invite extreme results that jar one's constitutional sensibilities. *Id.* at 15, 111 S.Ct. at 1043. The Supreme Court in *Haslip* said that instructions should be fashioned to describe the proper purposes of punitive damages, so that the jury understands that punitive damages are not to compensate the plaintiff, but to punish the defendant and to deter the defendants and others from such conduct in the future. *Id.* at 16, 111 S.Ct. at 1044 which was not done in this case by the trial court. ". . . The punitive damages must bear a reasonable relationship to the injury, harm, or damage actually suffered by the plaintiff."

In this case, no harm, or damage was actually suffered by Trisler. All of his total costs, expenses and attorney fees, from the date he received a copy of Executive Builders Complaint and Summons to the present, were paid 100% by Indiana Insurance Company, his liability carrier. The trial court's judgment of $1,640,000 on the jury's award based solely on a percentage of the wealth of Robert Montgomery is unconstitutional, highly prejudicial, and should be set aside.

IV.

CONCLUSION

Robert Montgomery has been denied the equal protection of the laws, and due process of law, guaranteed to him by the Fifth and Fourteenth Amendments to the United States Constitution, and Art. 1, Sec. 23 of the Indiana Constitution. The Supreme Court should rectify what it should perceive as a gross miscarriage of justice and reverse the judgment of the Court of Appeals.

Respectfully submitted,

John D. Raikos No. 5896-49
ATTORNEY FOR APPELLANT

WORD COUNT CERTIFICATE

I verify that this PETITION FOR TRANSFER including footnotes does not exceed 4200 words pursuant to Appellate Rule 44(E), and is 2171 words by Word Perfect count.

John D. Raikos #5896-49

CERTIFICATE AND PROOF OF SERVICE

The undersigned certifies he has this date served a true copy of the Appellee's Petition to Transfer to the Supreme Court by depositing a true copy thereof in the United States Mail, postage prepaid and addressed to:

Michael E. Simmons, Esq.
HUME SMITH GEDDES GREEN & SIMMONS
54 Monument Circle 4th Floor
Indianapolis, Indiana 46204

this 21st day of February 2001.

John D. Raikos

John D. Raikos
Attorney at Law
1800 N. Meridian St. Suite 408
P.O. Box 44444
Indianapolis, Indiana 46244
Telephone (317) 925-5200
Telecopier FAX (317) 925-5596

IN THE
SUPREME COURT OF INDIANA

FILED
MAR 14 2001

NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC., An Indiana Corporation,	)	
Appellant, (Plaintiff and Counter-Defendant, below),	)	Appeal from the Shelby County Circuit Court
and	)	
ROBERT L. MONTGOMERY and DOLORES MONTGOMERY,	)	
Appellants, (Third-Party Defendants, below),	)	
v.	)	
G. RAYMOND TRISLER,	)	The Honorable Charles O'Connor, Judge
Appellee, (Defendant, Counter-Plaintiff and Third-Party Plaintiff, below).	)	

APPELLEE'S BRIEF IN
RESPONSE TO PETITION TO TRANSFER

Michael E. Simmons
Attorney No. 136-49
Attorney for Appellee,
G. Raymond Trisler

HUME SMITH GEDDES GREEN & SIMMONS, LLP
54 Monument Circle, 4th Floor
Indianapolis, IN 46204-2996
(317) 632-4402
FAX: (317) 632-5595

IN THE
SUPREME COURT OF INDIANA

NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC., An Indiana Corporation,	)	
Appellant, (Plaintiff and Counter-Defendant, below),	)	Appeal from the Shelby County Circuit Court
and	)	
ROBERT L. MONTGOMERY and DOLORES MONTGOMERY,	)	
Appellants, (Third-Party Defendants, below),	)	
v.	)	
G. RAYMOND TRISLER,	)	The Honorable Charles O'Connor, Judge
Appellee, (Defendant, Counter-Plaintiff and Third-Party Plaintiff, below).	)	

APPELLEE'S BRIEF IN
RESPONSE TO PETITION TO TRANSFER

I. QUESTION PRESENTED ON PETITION TO TRANSFER

The sole issue preserved in the Petition To Transfer is whether the punitive damages awarded against Robert Montgomery are excessive as a matter of law.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED ON PETITION TO TRANSFER	i
TABLE OF CONTENTS	ii
TABLE OF CASES AND AUTHORITIES	iii
BACKGROUND AND PRIOR TREATMENT OF ISSUE PRESENTED ON PETITION TO TRANSFER	2
ARGUMENT	3
CONCLUSION	14
WORD COUNT CERTIFICATE	16
CERTIFICATE OF SERVICE	17

TABLE OF CASES AND AUTHORITIES

Case	Page
Archem, Inc. v. Simo, 549 N.E.2d 1054 (Ind. App. 1990)	11
BMW of North America, Inc. v. Gore, 517 U.S. 559 116 S.Ct. 1589, 134 L.Ed.2d 809 (1996)	7,10
Bright v. Kuehl, 650 N.E.2d 311 (Ind. App. 1995)	12
Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.E.2d 219 (1989)	11
Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135 (Ind. 1988)	5
Budget Car Sales v. Stott, 662 N.E.2d 638 (Ind. 1996)	5,15
Coachmen Industries, Inc. v. Dunn, 719 N.E.2d 1271 (Ind. App. 1999), trans. denied 735 N.E.2d 235 (Ind. 2000)	4,5,10
Emerson v. Markle, 539 N.E.2d 35 (Ind. App. 1989)	2,11
Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. App. 1999), trans. denied 726 N.E.2d 310 (Ind. 1999), cert. denied, ___U.S.___, 120 S.Ct. 1424, 146 L.Ed.2d 315 (2000)	7,12
Gosnell v. Indiana Soft Water Service, Inc., 503 N.E.2d 879 (Ind. 1987)	13
Indiana & Michigan Electric Co. v. Stevenson, 173 Ind. App. 329, 363 N.E.2d 1254 (1977)	12
Michigan Mutual Insurance Company v. Sports, Inc., 698 N.E.2d 834 (Ind. App. 1998), trans. denied 714 N.E.2d 168 (Ind. 1999)	15
Miller Brewing Company v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993)	15
Neibel v. Trans World Assurance Co., 108 F.3rd 1123 (9th Cir. 1997)	8
Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991)	11
Ramada Hotel Operating Co. v. Shaffer, 576 N.E.2d 1264 (Ind. App. 1991)	12

TABLE OF CASES AND AUTHORITIES

Case	Page
Sack v. Hubbell, 613 N.E.2d 868 (Ind. App. 1993)	13
Smart & Perry Ford Sales, Inc. v. Weaver, 149 Ind. App. 693, 274 N.E.2d 718 (1971)	3
State v. Lake Criminal Court, 247 Ind. 87, 212 N.E.2d 21 (1965)	13
Sutton v. Roth, Wehrly, Heiny, Inc., 418 N.E.2d 229 (Ind. App. 1981)	3
Trisler v. Indiana Insurance Company, 575 N.E.2d 1021 (Ind. App. 1991)	9
Turner v. Town of Speedway, 528 N.E.2d 858 (Ind. App. 1988)	13
TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed. 366 (1993)	11

STATUTES AND RULES:

I.C. § 34-44-1-2	9

APPENDIX E

IN THE
SUPREME COURT OF INDIANA

NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC., An Indiana Corporation,	)	
Appellant, (Plaintiff and Counter-Defendant, below),	)	Appeal from the Shelby County Circuit Court
and	)	
ROBERT L. MONTGOMERY and DOLORES MONTGOMERY,	)	
Appellants, (Third-Party Defendants, below),	)	
v.	)	
G. RAYMOND TRISLER,	)	The Honorable Charles O'Connor, Judge
Appellee, (Defendant, Counter-Plaintiff and Third-Party Plaintiff, below).	)	

APPELLEE'S BRIEF IN
RESPONSE TO PETITION TO TRANSFER

Comes now Appellee, G. Raymond Trisler (hereinafter "Trisler"), by counsel, and submits the following brief for the Court's consideration in response to the Petition To Transfer filed herein by Appellant Robert L. Montgomery (hereinafter "Montgomery").

II. BACKGROUND AND PRIOR TREATMENT OF ISSUE PRESENTED ON PETITION TO TRANSFER

On July 7, 1999, the jury at trial returned a verdict of compensatory damages in this cause in favor of Trisler and against Robert Montgomery, Dolores Montgomery and Executive Builders, Inc. in the total amount of $178,240.00. Pursuant to an order of bifurcation, the jury then considered the issue of punitive damages. Trisler presented evidence establishing that Robert Montgomery had wealth in excess of $16 million dollars, that Executive Builders, Inc. was essentially defunct (with a negative net worth), and that Dolores Montgomery's annual income was approximately $15,000.00 per year. On June 8, 1999, the jury returned a verdict against Robert Montgomery for punitive damages in the amount of $1,640,000.00, which the trial court entered as a judgment on October 18, 1999.

Thereafter, the lower court denied Appellee's Motion To Correct Errors, and the Court Of Appeals Of Indiana affirmed the trial court judgment by written opinion on December 6, 2000. As to Montgomery's claim that the punitive damages award was excessive, the Court Of Appeals Of Indiana stated, in part:

> With respect to the amount of punitive damages that were awarded, we note that the ratio of those damages to compensatory damages was approximately nine to one. Contrary to Executive's claim, such an award is not error. In Emerson V. Markle, 539 N.E.2d at 40-41, we determined that a punitive damage award which was 150 times larger than the actual damage award was not excessive. Just as the facts show here, the Emerson case

> involved a personal crusade on the part of the defendant which was designed to intentionally and maliciously destroy an individual's reputation, peace of mind, and career. Id. at 40. Here, the jury heard evidence that Robert's economic wealth amounted to at least $16 million. The punitive damage award was approximately ten percent of that amount. Thus, it can hardly be said that leaving Robert with 90% of his wealth is oppressive in light of his conduct and attempts to destroy Trisler in a number of ways. An award of a lesser amount may well have been insufficient to punish Robert for his conduct and to deter him and other from engaging in such conduct in the future.

(741 N.E.2d 351 at 360).

Appellee's Petition For Rehearing was denied by that appellate court on January 22, 2000, and Montgomery has now filed a Petition To Transfer to this Court, seeking review of the Court Of Appeals Of Indiana decision.

III. ARGUMENT

Montgomery purports to raise a number of "issues" in the Petition To Transfer pertaining to the punitive damages award, all of which assert, in one fashion or another, that such damages were excessive as a matter of law.[1] However, none of those arguments

---

[1] In reality, Montgomery is actually requesting that this Court re-weigh the evidence and reach a different conclusion than that of the jury. That is not the proper standard of review. Instead, on appeal an appellate court will neither weigh the evidence nor judge the credibility of witnesses, but will look only to the evidence most favorable to the appellee, and the reasonable inferences to be drawn therefrom. Sutton v. Roth, Mehrly, Heiny, Inc., 418 N.E.2d 229 (Ind. App. 1981). The verdict of a jury will not be set aside unless the verdict is against all evidence, or there is a total lack of evidence to sustain the verdict, or where the verdict is against the uncontradicted evidence. Smart v. Ferry Ford Sales, Inc. v. Weaver, 149 Ind. App. 693, 274 N.E.2d 718 (1971). Utilizing these standards of review, it is clear the jury verdicts rendered in the trial court are overwhelmingly justified

are sufficient to justify an alteration or reversal of the punitive damage judgment, nor any change in the Court Of Appeals Of Indiana decision.

As one argument, Montgomery contends that punitive damages are a violation of the Indiana Constitution. Such contentions have previously been addressed and rejected in Coachmen Industries, Inc. v. Dunn, 719 N.E.2d 1271 (Ind. App. 1999) at 1278, trans. denied 735 N.E.2d 235 (Ind. 2000):

> Initially, we would note that a judgment that is a product of fair procedures is cloaked with a strong presumption of validity. Particularly, where impartial jurors were selected; the jurors heard all the evidence presented by both sides; the trial court properly instructed the jury on the law; and the trial court upheld the punitive award after considering its constitutionality, there is a presumption that the award is constitutional. Here, impartial jurors were selected; the jurors heard all the evidence; the trial court properly instructed the jury; and the trial court considered the Appellants' argument of unconstitutionality in its motion to correct error, which it denied. Accordingly, we begin our review of the constitutionality of this award with the presumption that it is valid. (Emphasis added).

As noted by the Court Of Appeals herein (741 N.E.2d 351 at 360), the judgment in the case at bar resulted from the exact same fair procedures which were extolled in Coachmen. Therefore, this court will presume the judgment is constitutionally valid.

---

and supported by the evidence presented at trial, as set forth below.

Proceeding from that foundational determination, the appellate courts then apply a very specific standard of review to determine whether punitive damages were appropriate in a particular case. As stated by this Court in Budget Car Sales v. Stott, 662 N.E.2d 638 (Ind. 1996), citing Bud Wolf Chevrolet, Inc. v. Robertson, 519 N.E.2d 135 (Ind. 1988):

> The correct standard of review for punitive damages is whether, considering only the probative evidence and the reasonable inferences supporting it, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing. (Emphasis added).

See, also, Coachmen, supra, at 1277.

Here, the jury did indeed correctly conclude that the conduct of Montgomery was, in fact, intentional, malicious and oppressive, and not the result of negligence, honest error or some other innocent human failing:

> From the evidence presented at trial, it is apparent that Robert issued a number of false statements in the complaint against Trisler. Even more compelling, the evidence reveals that the purpose of Executive's causes of action against Trisler was to use the litigation as a sham for asserting false and malicious allegations against him for the purpose of damaging Trisler's integrity and reputation.
>
> Even at trial, Robert answered "you bet" when asked whether he had filed the complaint against Trisler to "shut him up." R. at 2850. The evidence revealed that none of the individuals that Robert had identified as those who decided not to purchase a residence in the subdivision from Trisler had even heard of Trisler. R. at 1981-82, 2203. Rather, it was demonstrated that one

of the prospective purchasers had retracted his offer when Dolores refused to make good on her promise to perform repairs on one of the units. R. at 1979-81, 1995-96. Moreover, potential buyers named in several of the discovery documents did not even exist until after Executive's complaint had been filed. At least one witness testified that he was unaware of anyone who did not purchase the property at Cielo Vista because of Trisler's alleged wrongdoings. R. at 2163-64.

Additionally, while Robert claimed that Trisler had assaulted him in 1985 by "jabbing him with his forefinger," the evidence at trial showed that this incident never occurred. R. at 3154. A number of other allegations regarding Trisler's "wrongdoings" that Executive alleged in the interference complaint were also shown to be false. R. at 1967-71. An incident demonstrating intimidation included Robert's pounding on Trisler's front door at 5:30 a.m. on one occasion. R. at 3165, 3261-62, 3546. Further, Dolores falsely reported to the Board of Directors of the Association that Trisler had stolen property and referred to Trisler in her deposition as "slime" and "disease." R. at 2992.

In reviewing the evidence that was presented at trial, it is apparent that Robert and Dolores engaged in a personal crusade throughout the pendency of this action which was designed to intentionally and maliciously destroy Trisler's reputation and peace of mind. The evidence overwhelmingly demonstrated that Robert and Dolores acted maliciously toward Trisler. (Emphasis added).

(741 N.E.2d 351 at 359-360).

Clearly, there is no evidentiary deficiency which would mandate any action by this Court to reduce or reverse the punitive damage award.

The fall-back argument of Montgomery is that even if punitive damages are generally constitutional, and can be supported in this case by the malicious, oppressive and intentional conduct involved, the amount of such punitive damages is impermissively and unconstitutionally excessive. On that claim, the leading national

case is BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996), which thoroughly discussed punitive damages and the relationship to the Due Process Clause of the Fourteenth Amendment of the Constitution of the United States. Indeed, this Court has also adopted, interpreted and applied Gore to punitive damages awards in Indiana. See, e.g., Ford Motor Co. v. Ammerman, 705 N.E.2d 539 (Ind. App. 1999), where the Court Of Appeals Of Indiana declared at pages 561-562:

> . . . the Gore Court also specifically set forth three "guideposts" to determine whether an award is grossly excessive: (1) the degree of reprehensibility of the conduct at issue, (2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received, and (3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. Id. At 1598-99. We employ the same test here.

The Ammerman decision then applied the three "guideposts" of Gore to the specific facts of Ammerman, and concluded that the punitive damage award of $13,800,000.00 was not excessive. In the appeal at bar, the Gore analysis, when applied to the facts of this case, leads to the same conclusion.

As in Ammerman, there is no comparable criminal or civil statutory penalty for malicious prosecution or abuse of process. Consequently, that element of the Gore "guideposts" is not applicable. The second factor, the degree of reprehensibility of

Appellant's conduct, is highly relevant. Here, Montgomery deliberately and intentionally embarked upon an organized and systematic plan to completely discredit, injure and embarrass Trisler in the eyes of his neighbors and co-owners, and to financially burden and personally intimidate him.

As Trisler testified, the unfounded million dollar lawsuit against him resulted in six years of sleeplessness, mental anguish, depression and nervousness. (R., p. 3531). He was also placed in fear of losing his job, and was frightened by the conduct of Robert Montgomery. See, similarly, Neibel v. Trans World Assurance Company, 108 F.3rd 1123 (9th Cir. 1997). He felt as if his neighbors and co-owners blamed him for the dispute publicized by the Montgomerys, an impression which he felt he could never erase from their minds. And those were exactly the reactions anticipated by Montgomery: embarrassment, stress, financial depletion and pressure upon Trisler to get him to "shut up" about Montgomery's wrongful activities and financial obligations to the neighborhood homeowner's association, and to force the sale of Trisler's real estate located in that community.

In addition to the physical and mental toll on Trisler, the malicious suit filed at the direction of Montgomery knowingly created a risk of substantial financial cost. Initially, Trisler's defense was not provided through insurance coverage. (R., p. 3307). Because Trisler could not personally afford standard attorney rates to defend against the Complaint For Intentional Interference With Business, he agreed to a reduced hourly charge

containing a contingency fee element, with the hourly charges being owed "win, lose or draw", regardless of the outcome. (R., p. 3354). Later, Trisler's defense against the Complaint For Intentional Interference With Business was paid by insurance coverage, under a reservation of rights and while the insurance carrier pursued a declaratory judgment that no such defense was owed. (R., pp. 3317-3319; Trisler v. Indiana Insurance Company, 575 N.E.2d 1021 (Ind. App. 1991). By mere fortuity, Trisler secured the Summary Judgment against the Complaint For Intentional Interference With Business herein before the declaratory judgment proceeding concluded, thereby rendering moot any further defense and coverage disputes with the insurance carrier. (R., p. 3319).[2]

Regardless of the insurance coverage available, Montgomery's intent toward Trisler was clear. He purposefully and maliciously masterminded a completely false and unfounded lawsuit against Trisler, an innocent individual, knowing that the cost and expense of defending against those wrongful claims would be financially substantial and emotionally stressful. The goal of such activity was solely to hide and conceal Montgomery's own wrongdoing and debts owed to the community homeowner's association. He was motivated by profit and greed, without any concern whatsoever for the financial, social, emotional or health effects to Trisler.

---

[2] Montgomery attempts to utilize the insurance defense payments to his benefit, arguing that because of insurance coverage, Trisler suffered no financial harm. That argument ignores the Indiana collateral source statute which prohibits a wrongdoer from benefitting from collateral sources which may be available to a defendant. I.C. § 34-44-1-2.

Montgomery's conduct was reprehensible in both means and goals, and it is difficult to imagine a scenario more deserving of punitive damages. As stated by the United States Supreme Court in Gore: "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, or when the target is financially vulnerable, can warrant a substantial penalty." Here, the second element of the Gore analysis of punitive damages, the reprehensibility of Montgomery's conduct, has been more than satisfied.

The final prong of the Gore test is the need to consider the disparity between the compensatory harm suffered, or which could have been suffered, and the punitive damages awarded; i.e., the ratio of compensatory to punitive damages. Here, the compensatory damages of Trisler were $178,240.00, creating a punitive to compensatory ratio of approximately 9 to 1. However, that ratio, in and of itself, is not dispositive of any issue regarding "excessiveness" of punitive damages. As the Indiana interpretation of Gore notes: ". . . the U.S. Supreme Court has declined to establish a single test [such as a simple ratio comparison] for determining whether an award of punitive damages violates the Constitution." Coachmen Industries, Inc. v. Dunn, 719 N.E.2d 1271 (Ind. App. 1999).. Rather, each case must be analyzed on its own facts, considering all guideposts suggested by Gore, as well as other factors. In fact, the United States Supreme Court itself has

upheld punitive damage awards with much higher ratios. See, e.g., TXO Production Corp. v. Alliance Resources Corp., 509 U.S. 443, 113 S.Ct. 2711, 125 L.Ed. 366 (1993), a ratio of 526 ($10 million) to 1 ($19,000); Pacific Mutual Life Insurance Co. v. Haslip, 499 U.S. 1, 111 S.Ct. 1032, 113 L.Ed. 2d 1 (1991), involving $4,000.00 in out-of-pocket costs and punitive damages of $800,000.00; and Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257, 109 S.Ct. 2909, 106 L.E.2d 219 (1989), a ratio of 117 ($6 million) to 1 ($51,000.00).

Likewise, Indiana decisions have affirmed punitive damage awards with ratios of compensatory damages of 150 ($150,000.00) to 1 ($1,000.00), Emerson v. Markle, 539 N.E.2d 35 (Ind. App. 1989); and 68 ($750,000.00) to 1 ($11,000.00), Archem, Inc. v. Simo, 549 N.E.2d 1054 (Ind. App. 1990). Emerson, as here, "involved a personal crusade designed to intentionally and maliciously destroy a man's reputation, peace of mind, and career." Id. at 40. Similarly, in Archem the defendant "was determined to ruin Simo's sales prospects" by refusing to supply him and by sending personnel into Simo's territory to lure his customers away, all in an attempt to coerce him into signing an exclusive, five-year contract with Archem." (Id. at 1061). See, also, Michigan Mutual Insurance Company v. Sports, Inc., 698 N.E.2d 834 (Ind. App. 1998), trans. denied 714 N.E.2d 168 (Ind. 1999), affirming a ratio of 14 to 1. Thus, even when applying the Gore approach to punitive damages evaluations, Indiana courts will do more than simply and blindly

resort to a "ratio" analysis as the sole factor to affirm or reverse the jury's judgment of the sums necessary to punish this wrongdoer and to deter him, and others, from similar conduct in the future.

Furthermore, in addition to the three-prong approach suggested by Gore, under Indiana law "the economic wealth of the defendant should be considered." Ammerman, supra, at p. 563, citing Indiana & Michigan Electric Co. v. Stevenson, 173 Ind. App. 329, 363 N.E.2d 1254 (1977), and Bright v. Kuehl, 650 N.E.2d 311, 316 (Ind. App. 1995), reh'g. denied. Economic wealth considerations are necessary based upon the theory that it will take a greater penalty to dissuade the rich than the poor from oppressive conduct", Ramada Hotel Operating Co. v. Shaffer, 576 N.E.2d 1264, 1268 (Ind. App. 1991), since the purpose of punitive damages is to punish the wrongdoer and deter him, and others, from engaging in similar conduct in the future. Ammerman, supra.

In the case at bar, the evidence permitted the jury to establish Montgomery's wealth in excess of $16,000,000.00. The punitive damage award is approximately 10% of that amount. It can hardly be said that leaving Robert Montgomery with over 14 million dollars, 90% of his wealth, is oppressive, especially in light of his conduct and attempts to completely ruin Trisler socially, emotionally and financially. It is clear from his actions, and his willingness to become involved in expensive and protracted litigation, that Montgomery would not be deterred in the least by a punitive damage of any lesser amount.

Finally, Montgomery argues that the punitive damage award herein should be influenced by the 1998 Indiana statute limiting punitive damage awards to three times the compensatory damages, as a statement of "public policy". However, the 1998 statute is not applicable to this litigation, which was pending prior to its enactment. See, e.g., Sack v. Hubbell, 613 N.E.2d 868, 869-870 (Ind. App. 1993):

> As a general rule, statutes will normally be given prospective application unless there are strong and compelling reasons to do otherwise. Gosnell v. Indiana Soft Water Service, Inc., 503 N.E.2d 879 (Ind 1987). While statutes addressing merely procedural and remedial matters may be applied retroactively, such application is not required. Id. Retroactive application is the exception for even remedial laws and such statutes will not be applied retroactively without strong and compelling reasons. Id., Turner v. Town of Speedway, 528 N.E.2d 858 (Ind. App. 1988).

Indeed, if the legislature had intended the 1998 statute to serve as an immediate statement of public policy, it could have included retroactive application in the statutory language. But, since the legislature did not see fit to make this statute retroactive, it became effective July 1, 1998, and has no application to the litigation at bar, filed in 1987, 12 years earlier. See, also, State v. Lake Criminal Court, 247 Ind. 87, 212 N.E.2d 21 (1965).

CONCLUSION

The punitive damages award rendered against Montgomery is overwhelmingly justified and supported by the evidence at trial. He purposely and maliciously orchestrated and financed a false and unfounded lawsuit against Trisler, fully aware of the emotional stress and potential financial burden which would result to Trisler. Montgomery also conducted other public attacks on Trisler to ruin his reputation and standing within his own community and neighborhood. All of these acts were performed in an attempt to remove Trisler from the area and to prevent him from revealing Montgomery's own wrongdoing and debts owed to the community's homeowner's association. Montgomery's actions were reprehensible in both the means and the ends desired. There is no scenario more deserving of punitive damages.

Furthermore, it cannot be seriously asserted that the punitive damages were unconstitutional or improperly excessive. The jury awarded only 10% of Montgomery's established wealth, leaving him with 90% of his wealth, exceeding $14 million dollars. Any lesser amount would be insufficient to both punish and to deter him, and others, from such conduct in the future.

Finally, contrary to Montgomery's assertions, the Court Of Appeals decision does not conflict with the prior Indiana decisions in Michigan Mutual Insurance Company v. Sports, Inc., 698 N.E.2d 834 (Ind. App. 1998), trans. denied 706 N.E.2d 555 (Ind. 1999) (which upheld a punitive damage award, after applying the Gore analysis, of $1,000,000.00 on a compensatory damage award of $78,000.00 a ratio of almost 13 to 1), or Budget Car Sales v. Stott, 656 N.E.2d 261 (Ind. 1995) (where the appellate court determined there was no clear and convincing evidence capable of supporting a punitive damage award, unlike the case at bar), or Miller Brewing Co. v. Best Beers of Bloomington, Inc., 608 N.E.2d 975 (Ind. 1993) (which upheld the Indiana rule prohibiting punitive damages on a breach of contract theory, absent an independent tortious act on the part of the defendant). Here, the Court Of Appeals followed the proper standard of review and correctly determined that the punitive damage award against Montgomery was overwhelmingly supported by the evidence and comported with the Constitutional requirements of both Indiana and the United States.

Montgomery has failed to raise a single issue in the Petition To Transfer which would justify any alteration or reversal of the jury verdict and judgment, or any amendment of the Court Of Appeals Of Indiana decision. The punitive damages are overwhelmingly supported by the evidence presented at trial, and do not violate any portion of the United States or Indiana Constitutions.

WHEREFORE, for all of those reasons set forth above, Appellee, G. Raymond Trisler, prays this Court to deny the Petition To Transfer.

Respectfully submitted,

Michael E. Simmons
HUME SMITH GEDDES GREEN & SIMMONS, LLP
Attorney No. 136-49
54 Monument Circle, 4th Floor
Indianapolis, IN 46204-2996
Telephone (317) 632-4402

Attorney for G. Raymond Trisler

CERTIFICATE OF COMPLIANCE
WITH WORD-COUNT LIMITATION

Michael E. Simmons, counsel for G. Raymond Trisler, hereby verifies that the Appellee's Brief complies with the Indiana Appellate Rule 44(E) word limitation, in that said Brief contains a total of 3,784 words, as reflected by the word count system of Wordperfect.

Michael E. Simmons
HUME SMITH GEDDES GREEN & SIMMONS, LLP
Attorney No. 136-49
54 Monument Circle, 4th Floor
Indianapolis, IN 46204-2996
Telephone (317) 632-4402

Attorney for G. Raymond Trisler

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing was forwarded by U.S. Mail, postage prepaid, to the following attorneys on the 14th day of March, 2001.

John D. Raikos
Attorney at Law
1800 N. Meridian St., Suite 403
P.O. Box 44444
Indianapolis, IN 46244

Michael E. Simmons

APPENDIX F

IN THE

SUPREME COURT OF INDIANA

CAUSE NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellant/Plaintiffs v. G. RAYMOND TRISLER, Appellee/Defendant	)	COURT OF APPEALS No. 73A01-0001-CV-30 Lower Court CAUSE NO. 73C01-8803-CP-057 Shelby Circuit Court Honorable Charles O'Connor Judge

ROBERT L. MONTGOMERY'S REPLY
FOR TRANSFER TO THE SUPREME COURT

John D. Raikes No. 5896-49
Attorney at Law
1800 N. Meridian St. Suite 408
P.O. Box 44444
Indianapolis, Indiana 46244
Telephone (317) 925-5200

IN THE

SUPREME COURT OF INDIANA

CAUSE NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellant/Plaintiffs v. G. RAYMOND TRISLER, Appellee/Defendant	COURT OF APPEALS No. 73A01-0001-CV-30 Lower Court CAUSE NO. 73C01-8803-CP-057 Shelby Circuit Court Honorable Charles O'Connor Judge

ROBERT L. MONTGOMERY'S REPLY TO APPELLEE'S ISSUES OPPOSING TRANSFER

I.

THE $1,640,000 AWARD IS ADDITIONAL COMPENSATION

The Appellee, Ray Trisler, does not controvert or dispute the facts Robert Montgomery presented in his Petition For Transfer. Montgomery is not asking this court to re-weigh the evidence, nor judge the credibility of witnesses in order to reach a different conclusion than reached by the jury.

The punitive damages were awarded primarily because a lawsuit was filed against Ray Trisler by Executive Builders. Trisler testified that as a result of being sued, 1) Ray Trisler was provided a complete legal defense at no cost (R. 3306, 14-25; R. 3307; 3380,

9-23); 2) suffered no quantifiable monetary damages expressed in dollars for mental anguish (R. 3537-3539; 3537, 1-22); 3) was not physically injured (R. 792, 11-20; 3532. 1-8); 4) was not medically treated nor cared for by any medical care provider (3531, 14-24); 4) had not been demeaned in the eyes of his neighbors and co-owners at Cielo Vista where the alleged wrongs occurred (R. 3531, 1-13); 6) had not suffered any loss of his career (R. 793, 2-10; 7) had not suffered any loss of employment, R. 793, 19-25; 794, 1-13) and 7) cannot specify one malicious overt act committed against him by Robert Montgomery. (R. 3533. 6-22). Trisler is not entitled to a punitive damages award as additional compensation. This case is distinguishable on its facts from all of the legal authorities cited in support of any punitive damages award.

At page 10 of his Response, Trisler states that the compensatory damages awarded to Ray Trisler was $178,240.00 and computes the ratio of compensatory damages to punitive damages at 9 to 1. The jury allocated only $15,000 of that $178,240 as compensatory damages against Robert Montgomery. The punitive damages award against Robert Montgomery is thus 109 times greater - not 9 times.

The jury awarded compensatory damages to Trisler in the amount of $178,240.00. $143,240, or 81% was assessed against Executive Builders, which is nearly ten times greater than the $15,000 it assessed against Montgomery. The harm to Ray Trisler in being frivolously sued by Executive Builders is an award of his costs and reasonable attorney fees prescribed by Indiana statute, which the trial court did not apply.

Montgomery's conduct toward Trisler was benign. Robert Montgomery was cordial to Ray Trisler and invited him to air any grievances he had with the Homeowners

Association at an annual meeting of the Homeowners on June 14, 1987. Ray Trisler declined to speak. (R. 1453-1457). Trisler admitted under oath that he could not name one of the sixty (60) Dwelling Unit Owners at Cielo Vista who had expressed any derogatory feelings as a result of the conduct of Executive Builders and the Montgomerys. (R. 992, 15-22). Ray Trisler testified on July 6, 1999, that his injury was "mental anguish - all types" which could not be quantified in *money damages*, and that his injuries were limited to: "A. Nervousness, that's. . .all I can think of right at the moment. (R. 3531, 14- 24). Trisler never saw a medical doctor for depression, (R. 3532, 1-8) and had paid "absolutely nothing" for his "defense costs". (R. 3306, 14-25; R. 3307).

The Court of Appeals herein, did not specify a single overt act of malice in the Record to reasonably conclude that:

> "Montgomery deliberately and intentionally embarked upon an organized and systematic plan to. . .discredit, injure and. . .to financially burden and personally intimidate him."

Ray Trisler testified he ". . . .had no personal knowledge with regard to which acts that Robert Montgomery and/or Dolores were or were not authorized by Executive Builders." (R. 3533, 6-22).

Executive Builders lawsuit against Trisler was filed on advice of its legal counsel Dennis L. Thomas, Jr. (R. 2085, 22-25), and the Complaint was admitted in evidence. (R. 2086, 1-9). Under IND T.R 11 the signature by Dennis L. Thomas, Jr. constituted his certificate that there were good grounds to file such lawsuit, which if false, subjects the attorney to discipline. The trial court refused to allow the pleadings to conform to the evidence presented to the jury as to Montgomery's complete defense. (R. 3763, 15-23).

Trisler's disputes with Executive Builders arose out of contract, that makes the decision of the Supreme Court in *Miller Brewing v. Best Beers*, 608 N.E.2d 975, 983, (Ind. 1993) applicable. The Court in *Miller* determined that there is no "right" to punitive damages, and that "punitive damages are not compensatory because in that case the plaintiff has already been awarded damages to compensate him for his loss. . .and anything in addition is a 'windfall'." II.

CONCLUSION

The Court of Appeals did not articulate exactly what Robert Montgomery did to justify a punitive damages award that was 109 times greater than the $15,000 compensatory damages award. Reliance upon counsel is an absolute defense. It cost Trisler absolutely nothing to defend the lawsuit filed against him by Executive Builders. Trisler suffered no tangible physical or emotional injuries that deserves a whopping $1,640,000 punitive damages award. The significant departure from the accepted law of punitive damages under the facts of this case warrants the exercise of the jurisdiction by the Supreme Court. Such award is a denial of the equal protection of the laws, and due process of law, to Montgomery guaranteed by the XIVth Amendment to the United States Constitution, and Art. 1, Sec. 23 of the Indiana Constitution. The Judgment of the Court of Appeals should be reversed and appropriate appellate relief granted to Robert Montgomery.

Respectfully submitted,

John D. Raikos No. 5896-49
ATTORNEY FOR APPELLANT

WORD COUNT CERTIFICATE

I verify that this PETITION FOR TRANSFER including footnotes does not exceed 1000 words pursuant to Appellate Rule 44E, and is 997 words by Word Perfect 5.1 count.

John D. Raikos #5196-49

CERTIFICATE AND PROOF OF SERVICE

The undersigned certifies a true copy of the Appellee's Reply was served by depositing in the United States Mail, postage prepaid and addressed to:

Michael E. Simmons, Esq.
HUME SMITH GEDDES GREEN & SIMMONS
54 Monument Circle 4th Floor
Indianapolis, Indiana 46204

this 26th day of March 2001.

John D. Raikos

John D. Raikos
Attorney at Law
1800 N. Meridian St. Suite 408
Indianapolis, Indiana 46244
Telephone (317) 925-5200
Telecopier FAX (317) 925-5596

APPENDIX G

FROM THE DESK OF
JUDGE JOHN G. BAKER
COURT OF APPEALS OF INDIANA

TO: CLERK'S OFFICE

RE: EXECUTIVE BUILDERS V. TRISLER
73A01-0001-CV-30

DATE: DECEMBER 14, 2000

Please replace the above case, which was handed down the 6th of December, with the attached corrected copy.

Thanks.

Sylvia

STATE OF INDIANA

BRIAN BISHOP
CLERK OF THE INDIANA SUPREME COURT
COURT OF APPEALS AND TAX COURT

217 STATE HOUSE
INDIANAPOLIS, IN 46204

(317) 232-1930
FAX (317) 232-8365

Cause Number
73A01-0001-CV-00030
Lower Court Number:
73C018803CP57

JOHN RAIKOS
1800 MERIDIAN ST, STE 408
P.O. BOX 44444
INDIANAPOLIS, IN 46244

Fax Number: 925-5596

EXECUTIVE BUILDERS, ET.AL. -V- TRISLER, G. RAYMOND

You are hereby notified that the COURT OF APPEALS has on this day 12/14/00
ISSUED THE ENCLOSED CORRECTION ON OPINION:

WITNESS my name and the seal of said Court,
this 14TH day of DECEMBER, 2000

Brian Bishop
Clerk Supreme Court, Court of Appeals and Tax Court

FOR PUBLICATION

ATTORNEY FOR APPELLANTS:

JOHN D. RAIKOS
Indianapolis, Indiana

ATTORNEY FOR APPELLEE

MICHAEL E. SIMMONS
Hume Smith Geddes Green & Simmons
Indianapolis, Indiana

IN THE
COURT OF APPEALS OF INDIANA

EXECUTIVE BUILDERS, INC., An Indiana Corporation, and ROBERT L. MONTOGMERY, and DOLORES MONTGOMERY,	)	
Appellants-Plaintiffs,	)	
vs.	)	No. 73A01-0001-CV-30
G. RAYMOND TRISLER,	)	
Appellee-Defendant.	)	

APPEAL FROM THE SHELBY CIRCUIT COURT
The Honorable Charles O'Connor, Judge
Cause No. 73C01-8803-CP-57

December 6, 2000

OPINION - FOR PUBLICATION

BAKER, Judge

This cause of action was born in 1987 and comes before us once again. See Trisler v. Executive Builders, Inc., 647 N.E.2d 390 (Ind. Ct. App. 1995), trans. denied. Appellants-plaintiffs and counter-defendants Executive Builders, Inc. (Executive Builders), Robert L. Montgomery and Dolores Montgomery (collectively referred to as "Executive") appeal the judgment entered in favor of appellee-defendant and counter-plaintiff G. Raymond Trisler. Specifically, Executive maintains that the judgment awarding Trisler $178,240 in compensatory damages and $1.64 million in punitive damages must be set aside because: 1) the trial court erred in refusing Executive's request to amend the pleadings to conform to the evidence; 2) the issue of "probable cause" with respect to Trisler's counterclaim for malicious prosecution should not have been presented to the jury; 3) the trial court did not respond adequately to inquiries that were made by the jury; 4) the trial court improperly read an instruction to the jury indicating that Trisler had prevailed on his complaint against Executive for interference; 5) the courtroom environment was substandard; 6) the trial court should have directed a verdict in favor of Executive, inasmuch as the evidence was not sufficient to support a verdict in Trisler's favor; and 7) the punitive damage award may not stand because it was based solely upon the jury's prejudice and passion. See Appellant's Brief at ii.

FACTS

The facts most favorable to the verdict are that Executive Builders, which was owned by Robert and Dolores Montgomery and a number of other individuals, purchased some real property in Greenwood in a development area known as Cielo Vista. The plan was to subdivide the property into sixty-lot units of condominium housing. While the

estimated value of the land was approximately $900,000, Executive paid a purchase price of $310,000 for its lots. Trisler owned and rented three of the seventeen units that had already been sold. In 1985, he moved to an adjoining subdivision but continued to rent his Cielo Vista units.

At one point, Dolores took it upon herself to amend certain Homeowner's Association (Association) documents in the subdivision to "properly reflect" the corporate status "as viewed by Executive Builders." Trisler, 647 N.E.2d at 391. Prior to Dolores's actions, Trisler had attempted to revive the Association by having another homeowner in the subdivision file an annual corporate report with the Indiana Secretary of State. In response, Executive appointed and/or elected a "purported" new Board of Directors and Officers for the Association. Id. Robert served as the self-appointed chairman of the Association. Dolores and other members of Executive were designated to serve three-year terms on the Association's Board of Directors. Record at 3429.

In May 1986, the Association placed a "special assessment" against the original seventeen unit owners, purportedly for repairs to the property. Approximately one year later, the Association attempted to place liens against the units on the basis of unpaid regular monthly assessments for the period between 1980 and 1985.

Trouble began to brew with respect to the levying of such "assessments" and Trisler, who believed that the charges brought by the Association were improper, consulted with legal counsel. Thereafter, Trisler maintained that the Board of Directors had been improperly appointed and that Executive owed the Association "thousands of dollars." R. at 2476.

In response, Robert immediately began accusing Trisler of wrongdoing. For instance, Robert sent a letter to all homeowners indicating that Trisler was desiring to "keep him and his friends in the rental property business and to protect their investments at your expense." R. at 3163-64. Robert sent additional correspondence to the property owners alleging that Trisler "would just as soon turn this community into a slum rental project." R. at 2863. After Robert discovered that his written correspondence had not produced any favorable result to him, he filed a complaint in the trial court on December 11, 1987, against Trisler, alleging "Intentional Interference with Business." R. at 51. The allegations asserted that Trisler had advised the homeowners in the development to withhold payment of their monthly fees and that he interfered with the Association "on an ongoing basis." R. at 59. Executive also maintained that Trisler utilized attorneys to create artificial legal obstacles, such as challenging the validity of all meetings of the Association and generally impeding the progress of Executive. R. at 59. Moreover, Executive asserted that Trisler deterred potential customers from making purchases of the condominium properties and maintained that Trisler's actions were done with the willful intent to injure and damage Executive which entitled it to punitive damages. R. at 63.

Trisler denied all allegations and proceeded to file a counterclaim against Executive Builders along with a third-party seven-count complaint against Robert and Dolores. Trisler sought damages for defamation, invasion of privacy, abuse of process and frivolous litigation. The trial court eventually entered summary judgment in favor of Trisler upon the complaint for business interference that Executive had filed against him.

Robert and Dolores continued their attack on Trisler. On February 7, 1988, the purported minutes of the annual meeting of the Association, held on June 14, 1987, were typed and distributed to the homeowners. Dolores was responsible for the contents of all such newsletters to the homeowners. R. at 2280. That newsletter cast Trisler in a derogatory and unfavorable light. R. at 2852-56.

Although summary judgment for Trisler was entered on February 21, 1990, the trial court vacated its order on March 31, 1994, in accordance with Executive's request. Trisler then appealed that order to this court, where we reversed the trial court and remanded the cause with instructions that the original judgment be reinstated with respect to the interference claim. Trisler, 647 N.E.2d at 394.

Following remand, Trisler's counterclaim and third-party complaint against Executive proceeded to trial on June 28, 1999. At the close of all evidence, Executive filed a motion for a directed verdict on the grounds that "Trisler did not, and could not identify any act that was committed individually by Robert . . . and/or Dolores." Appellant's brief at 24. The motions were denied and the jury proceeded to return verdicts in Trisler's favor against Executive Builders in the amount of $143,240, against Robert in the sum of $15,000 and against Dolores for $20,000, for a total judgment award of $178,240. Thereafter, a hearing was held on the issue of punitive damages. During that phase of the trial, it was determined that Robert's assets exceeded $16 million, the assets of Executive Builders was in a negative amount totaling hundreds of thousands of dollars and that Dolores earned an annual income of $15,000. Neither Robert nor

Dolores appeared at that juncture of the trial nor offered testimony in rebuttal of the asset values that had been established.

On June 8, 1999, the jury awarded punitive damages against Robert in the amount of $1.64 million and no punitive damages against Executive Builders or Dolores. The following day, Executive requested the trial court to vacate the jury award with respect to the total damage award. These motions were denied on October 18, 1999, and the trial court proceeded to enter judgment in the amount awarded by the jury. Thereafter, the trial court denied Executive's motion to correct error on December 22, 1999. Executive now appeals.

DISCUSSION AND DECISION

A. Amendment of Pleadings

Executive contends that the trial court erred in refusing its request to amend the pleadings to conform to the evidence. Specifically, Executive claims that it was entitled to assert the affirmative defense of "advice of counsel" following the presentation of the evidence, and further maintains that the trial court erred in refusing to give a final instruction with respect to this defense.

In general, the issues of a case are determined, not by the pleadings, but by the evidence produced at trial. Svetich v. Svetich, 425 N.E.2d 191, 193 (Ind. Ct. App. 1981). For an issue not raised by the pleadings to be litigated by implied consent, thereby permitting an amendment of the pleadings to conform to the evidence presented at trial, both parties must know that the issue was being presented. See Dotlich v. Dotlich, 475 N.E.2d 331, 349-50 (Ind. Ct. App. 1985), trans. denied. With respect to the defense

pertaining to advice of counsel, the appellant must show, by a preponderance of the evidence, that he acted in good faith and fully and truthfully made known to legal counsel all facts within his knowledge, or which could have been ascertained by the exercise of due diligence. F.W. Woolworth Co. v. Anderson, 471 N.E.2d 1249, 1255 (Ind. Ct. App. 1984), trans. denied. Additionally, one who desires to assert "advice of counsel" as a defense must also establish that such counsel was competent and disinterested. This showing is an essential prerequisite to the invocation of the defense. Id.

Here, Executive's counsel requested the trial court to give the following instruction which contained a portion of the language of Ind. Trial Rule 11(A):

> The signature of an attorney constitutes a certificate by him that he has read the pleadings; that to the best of his knowledge, information, and belief, there is good ground to support it; and that it is not interposed for delay. . . . For a willful violation of this rule an attorney may be subjected to appropriate disciplinary action.

Such an instruction was requested after testimony at trial indicated that Executive acted on advice of its counsel in pursuing the cause of action against Trisler. In refusing the instruction, the trial judge commented that:

> I will deny the Motion to Have the Pleadings Conform to the Evidence; however, there was evidence that, the Montgomerys testified that . . . the suit was filed after consultation with Mr. Thomas. So Mr. Raikos you may argue to the Jury that your clients caused the lawsuit to be filed after consulting with their attorney, but I'm not gonna give an Instruction that would advise the Jury that advice of counsel is an absolute defense because it was not pled affirmatively as I believe the Trial Rules require.

R. at 3763. Here, the record is devoid of testimony directly addressing the issue of advice of counsel as well as the extent of the information that was transmitted by Executive to its attorney. The evidence simply demonstrated that Executive had

consulted with an attorney who then signed the interference complaint. Moreover, if Executive desired to rely upon the defense of "advice of counsel," Trisler could have delved into the accuracy and totality of the information provided to the attorneys by Executive at trial, as compared to the allegations actually contained in the interference complaint which were subsequently shown to be false. Moreover, documentary evidence including memoranda, diaries or summaries provided to counsel may have been subject to discovery in order to verify the information that Executive had transmitted to counsel. Finally, Executive set forth no evidence establishing the competency of any of the attorneys who represented it during the course of the twelve-year litigation. As a result, Executive's request to amend the pleadings to conform to the evidence was correctly denied by the trial court for failure to present evidence of all necessary elements of the purported defense of advice of counsel. See F.W. Woolworth Co., 471 N.E.2d at 1255. Thus, the instruction as to this issue was also properly denied.

B. Probable Cause and Malicious Prosecution

Executive next urges that the issue of "probable cause" regarding the malicious prosecution claim should not have been submitted to the jury. Specifically, it contends that the existence of probable cause is purely a question of law and the trial court, rather than the jury, was obligated to determine its existence or nonexistence.

To resolve this issue, we note that to support a claim for malicious prosecution, the plaintiff must show the occurrence of legal action instituted by the defendant with malice and the absence of probable cause. Costello v. Mut. Hosp. Ins. Inc., 441 N.E.2d 506, 508 (Ind. Ct. App. 1982). The plaintiff must also demonstrate that the litigation terminated in

the plaintiff's favor and that damages resulted. Id. The determination of probable cause is normally an issue of fact for the jury's determination. When the facts are undisputed, however, probable cause is for the court to decide as a matter of law. Id.

In the instant case, it is readily apparent from the record that the facts Executive alleged in the interference complaint with regard to Trisler's alleged conduct are quite different from those that were presented by the testimony at trial. Inasmuch as the facts were disputed by the parties, the trial court did not err in permitting the jury to determine the issue of probable cause with respect to Trisler's claim for malicious prosecution.

C. Response to Jury Questions

Executive claims that it was denied a fair trial when the trial judge refused to provide the jury with a copy of the twenty-two final instructions that were read to it. Moreover, Executive maintains entitlement to reversal because the trial judge erred in not clarifying certain portions of the instructions during deliberations.

We note that the trial court's failure to answer the jury's questions during deliberation is not error per se, and the trial court must exercise discretion in determining whether certain inquiries of the jury should be answered. Bituminous Fire & Marine Ins. Co. v. Culligan Fyrprotexion, Inc., 437 N.E.2d 1360, 1364 (Ind. Ct. App. 1982). In criminal cases, our supreme court has determined that the generally accepted procedure in answering a jury's question on a matter of law is for the trial court to re-read all the instructions and not to qualify, modify, or explain its instructions in any way. Riley v. State, 711 N.E.2d 489, 492 (Ind. 1999).

A panel of this court has determined that the practice of providing copies of the jury instructions to the jury is not recommended. See Taylor v. Monroe County, 423 N.E.2d 699, 701 (Ind. Ct. App. 1981). We note, however, that favorable results have been reached when written or taped instructions are provided to the jurors during deliberations. Amer. Bar Ass'n. Comm. on Jury Standards, Standards Relating to Juror Use and Management, 148, (rev. ed. 1993) (commenting on Standard 16(c)(ii)). Such a practice aids juror comprehension, and the ABA standards specifically call for such a procedure of making the instructions available to the jury during deliberations. Id.[1] It has also been suggested that the effect of sending the instructions to the jury room may: a) increase juror confidence in their verdict, b) reduce deliberation time, and c) reduce the likelihood of disputes among jurors regarding the content and application of instructions. G. Thomas Munsterman, Paula Hannaford & G. Marc Whitehead, Jury Trial Innovations (1998 ed.). The Judicial Administration Committee of the Indiana Judicial Conference has also spoken on this issue and has recommended that final instructions should be provided to each juror during deliberations. Reports of the Citizens Comm'n for the Future of Indiana Courts and the Judicial Administration Committee of the Indiana Judicial Conference, Juries for the 21st Century, Vol. I, at 78 (2000).

In this case, the trial judge responded to the jury's questions by sending a note to them indicating that "All I can do is re-read the instructions." R. at 1583. While we believe that the preferred method would have been for the trial judge to have sent copies

---

[1] While such a practice may be acceptable, it is also imperative that if the instructions go back to the jury, they must be on a "clean" copy without indicating which of the parties may have submitted the

of the instructions to the jury room in accordance with the commentaries discussed above, we do not condemn his response to the questions made in accordance with our decision in Taylor. Thus, in light of our decision today, we find it acceptable for a trial judge to either re-read the instructions as suggested in Taylor, or to send unmarked copies of them to the jury room. Thus, in this case, there was no error.

D. Jury Instruction as to Interference Claim

Executive claims that the trial court erred in instructing the jury that the Interference action it filed was ultimately decided in Trisler's favor. Specifically, it maintains that the instruction erroneously provided that the "issues on the merits" with respect to this issue had been decided. Appellant's brief at 20.

The portions of the instruction of which Executive complains provide that:

> The claim filed by Executive Builders, Inc. was ultimately resolved in favor of Ray Trisler and against Executive Builders, Inc. by decision of the Court of Appeals of Indiana on March 8, 1995.
>
> The remaining issues for your consideration are G. Ray Trisler's claims against Executive Builders, Inc. for abuse of civil process, wrongful intimidation, breach of fiduciary duties with respect to entrusted properties, intentional misconduct, malicious prosecution.
>
> Also remaining for your consideration are G. Ray Trisler's claims against Robert and Dolores Montgomery for abuse of civil process, wrongful intimidation, wrongful deception and/or mischief, breach of fiduciary duties with respect to entrusted properties, intentional misconduct, invasion of privacy, malicious prosecution and against Robert Montgomery for defamation.

R. at 1556-57.

---

instructions for the court's inclusion.

We initially observe that Executive did not raise any objection to the above-quoted preliminary or final jury instruction at trial. Thus, the issue is waived. Lewis v. Davis, 410 N.E.2d 1363, 1368 (Ind. Ct. App. 1980). Waiver notwithstanding, we note that Trisler submitted evidence in an effort to establish his claim to summary judgment, and Executive proferred no evidence to the contrary. Moreover, Executive's failure to then timely file an appeal from that summary judgment order does not negate the result that the complaint for Interference was terminated in Trisler's favor on the merits. Thus, Executive's argument that this cause was "erroneously presented to the jury" must fail. See Appellant's brief at 34.

E. Environment of the Courtroom

Executive next claims that it was denied a fair trial because of the substandard conditions of the courtroom. Specifically, Executive contends that a new trial is warranted because of the existence of poor acoustics and the amount of "diffused sunlight" that was shining in counsel's face throughout the trial. Appellant's brief at 47.

We note that counsel for Executive voiced no complaints of such alleged "substandard" conditions during trial. The trial judge also addressed the jury at the onset of the case that traffic noise could be a problem and instructed jury members to raise their hand in the event anyone had difficulty hearing the testimony. R. at 1776. At no time during the trial did any juror express difficulty in hearing the proceedings, nor did anyone else in the courtroom so indicate. Finally, we note that Executive has not made any claims that it was prejudiced by such conditions. Thus, there was no error.

F. Sufficiency of the Evidence

Executive next contends that the evidence was insufficient to support the jury's verdict. Specifically, it maintains that the record reveals that the claims Trisler brought against Executive Builders, Robert, and Dolores merely showed a "churning" of attorney fees and an unwarranted request for punitive damages. See Appellant's brief at 49

We initially observe that we will neither reweigh the evidence nor judge the credibility of witnesses. F.W. Woolworth Co., 471 N.E.2d at 1253. Rather, we will consider only the evidence most favorable to the judgment along with all reasonable inferences which may be drawn from that evidence. Id. Only in those instances where the evidence points to a single conclusion different from the one reached by the trial court may we reverse on grounds of insufficient evidence. Id. While a verdict may be overturned if it is legally or logically inconsistent, contradictory or repugnant, this court indulges in every reasonable presumption in favor of legality of the jury's verdict. Emerson v. Markle, 539 N.E.2d 35, 39 (Ind. Ct. App. 1989), trans. denied.

As set forth in the FACTS, Trisler's counterclaim and third-party complaint filed against Executive sought damages for defamation, invasion of privacy, abuse of process and frivolous litigation with respect to Executive's complaint for interference. R. at 517-31. From the evidence presented at trial, it is apparent that Robert issued a number of false statements in the complaint against Trisler. Even more compelling, the evidence reveals that the true purpose of Executive's causes of action against Trisler was to use the litigation as a sham for asserting false and malicious allegations against him for the purpose of damaging Trisler's integrity and reputation.

Even at trial, Robert answered "you bet" when asked whether he had filed the complaint against Trisler to "shut him up." R. at 2850. The evidence revealed that none of the individuals that Robert had identified as those who decided not to purchase a residence in the subdivision from Trisler had even heard of Trisler. R. at 1981-82, 2203. Rather, it was demonstrated that one of the prospective purchasers had retracted his offer when Dolores refused to make good on her promise to perform repairs on one of the units. R. at 1979-81, 1995-96. Moreover, potential buyers named in several of the discovery documents did not even exist until after Executive's complaint had been filed. At least one witness testified that he was unaware of anyone who did not purchase the property at Cielo Vista because of Trisler's alleged wrongdoings. R. at 2163-64.

Additionally, while Robert claimed that Trisler had assaulted him in 1985 by "jabbing him with his forefinger," the evidence at trial showed that this incident never occurred. R. at 3154. A number of other allegations regarding Trisler's "wrongdoings" that Executive alleged in the interference complaint were also shown to be false. R. at 1967-71. An incident demonstrating intimidation included Robert's pounding on Trisler's front door at 5:30 a.m. on one occasion. R. at 3165, 3261-62, 3546. Further, Dolores falsely reported to the Board of Directors of the Association that Trisler had stolen property and referred to Trisler in her deposition as "slime" and "disease." R. at 2992.

In reviewing the evidence that was presented at trial, it is apparent that Robert and Dolores engaged in a personal crusade throughout the pendency of this action which was designed to intentionally and maliciously destroy Trisler's reputation and peace of mind.

The evidence overwhelmingly demonstrated that Robert and Dolores acted maliciously toward Trisler. Thus, we decline to disturb the jury's verdict.

G. Punitive Damages

Robert next claims that the award of punitive damages was erroneous. Specifically, Robert argues that the judgment may not stand because there was no showing that his actions were malicious, oppressive and intentional. Moreover, Robert maintains that the award violated his rights to due process under the U ited States Constitution and Indiana Constitution in that the amount awarded was impermissibly excessive.

To resolve this issue, we initially observe that the standard of review for punitive damages is whether, considering only the probative evidence and the reasonable inferences supporting the judgment, without weighing evidence or assessing witness credibility, a reasonable trier of fact could find by clear and convincing evidence that the defendant acted with malice, fraud, gross negligence or oppressiveness which was not the result of a mistake of fact or law, honest error of judgment, overzealousness, mere negligence, or other human failing. Budget Car Sales v. Stott, 662 N.E.2d 638, 639 (Ind. 1996), trans. denied.

We also note that a judgment that is a product of fair procedures is cloaked with a strong presumption of validity. Coachmen Indus. Inc. v. Dunn, 719 N.E.2d 1271, 1278 (Ind. Ct. App. 1999), trans. denied. Particularly, where impartial jurors were selected; the jurors heard all the evidence presented by both sides; the trial court properly instructed

the jury on the law; and the trial court upheld the punitive award after considering its constitutionality, there is a presumption that the award is constitutional. Id.

Finally, we note that when reviewing the amount of punitive damages that are awarded, the following guideposts are used to determine whether an award is grossly excessive: 1) the degree of reprehensibility of the conduct at issue; 2) the disparity between the harm or potential harm suffered by the complaining party and the punitive damages the complaining party received; and 3) the difference between the punitive damages remedy and the civil penalties authorized or imposed in comparable cases. Ford Motor Co. v. Ammerman, 705 N.E.2d 539, 561-62 (Ind. Ct. App. 1999), trans. denied. Each case must be analyzed on its own facts, considering the guideposts set forth above, as well as other factors. Coachmen, 719 N.E.2d at 1278. Moreover, the economic wealth of the defendant should be considered when determining the amount of punitive damages that should be awarded. Ammerman, 705 N.E.2d at 563. Economic wealth considerations are necessary based upon the theory that it will take a greater penalty to dissuade the rich than the poor from engaging in oppressive conduct. Ramada Hotel Operating Co. v. Shafer, 576 N.E.2d 1264, 1268 (Ind. Ct. App. 1991).

Contrary to Robert's challenge to the constitutionality of the punitive damages award, the record reflects that impartial jurors were selected to hear the cause; the jurors heard all the evidence; the trial court properly instructed the jury; and the trial court considered Robert's argument of unconstitutionality in its motion to correct error, which it denied. Thus, the award is presumed to be constitutionally valid. See Coachmen, 719 N.E.2d at 1278.

In the instant case, Trisler testified that Executive's cause of action resulted in nearly six years of sleeplessness, mental anguish, depression and nervousness. R. at 3531. Trisler was frightened by Robert's actions and he believed that his neighbors and co-owners placed blame on him for the dispute that the Montgomerys had publicized. As set forth above, the evidence at trial demonstrated that Robert purposely and maliciously orchestrated and financed a false and frivolous cause of action against Trisler. Robert also conducted other public attacks on Trisler in an effort to ruin Trisler's reputation and standing within his own community and neighborhood. As a result, we cannot say that the award of punitive damages was error.

With respect to the amount of punitive damages that were awarded, we note that the ratio of those damages to compensatory damages was approximately nine to one. Contrary to Executive's claim, such an award is not error. In Emerson v. Markle, 539 N.E.2d at 40-41, we determined that a punitive damage award which was 150 times larger than the actual damage award was not excessive. Just as the facts show here, the Emerson case involved a personal crusade on the part of the defendant which was designed to intentionally and maliciously destroy an individual's reputation, peace of mind, and career. Id. at 40. Here, the jury heard evidence that Robert's economic wealth amounted to at least $16 million. The punitive damage award was approximately ten percent of that amount. Thus, it can hardly be said that leaving Robert with 90% of his wealth is oppressive in light of his conduct and attempts to destroy Trisler in a number of ways. An award of a lesser amount may well have been insufficient to punish Robert for his conduct and to deter him and others from engaging in such conduct in the future.

Finally, we reject Robert's argument that the amount of punitive damages awarded should be limited to three times the compensatory damages or $50,000, whichever is greater, in accordance with IND. CODE § 34-51-3-4. This statute, which became effective on July 1, 1998, does not apply to this cause, inasmuch as the litigation commenced in 1987, prior to its enactment. The legislature did not see fit to make this statute retroactive. Therefore, Trisler's recovery is not limited under the provisions of this statute.

CONCLUSION

In light of our disposition of the issues set forth above, we conclude that the trial court properly denied Executive's request to amend its pleadings to conform to the evidence. Additionally, the issue of probable cause regarding the malicious prosecution claim was properly submitted to the jury, and the trial court properly addressed the questions posed by the jury during trial. Moreover, the jury was correctly instructed with respect to Executive's claim against Trisler for interference, and Executive may not succeed on its claim that it was entitled to a new trial because of the purported substandard conditions of the court room. Finally, we conclude that sufficient evidence was presented to support the award of compensatory and punitive damages in favor of Trisler.

Judgment affirmed.

BAILEY, J., and VAIDIK, J., concur.

APPENDIX H

IN THE

COURT OF APPEALS OF INDIANA

CAUSE NO. 73A01-0001-CV-30

EXECUTIVE BUILDERS, INC. An Indiana Corporation, and ROBERT L. MONTGOMERY, and DOLORES MONTGOMERY, Appellant/Plaintiffs v. G. RAYMOND TRISLER, Appellee/Defendant	)	Appeal from the Circuit Court of Shelby County Civil Lower Court CAUSE NO. 73C01-8803-CP-057 CHARLES D. O'CONNOR, JUDGE

BRIEF OF APPELLANTS

Received by
7/7/00
10:45 am.

John D. Raikos #5896-49
1800 N. Meridian St., Suite 408
P.O Box 44444
Indianapolis, Indiana 46244
Telephone (317) 925-5200

ATTORNEY FOR APPELLANTS

for the Trial Court to decide the merits of Trisler's Count VII claim for "malicious prosecution" in favor of Appellants.***[12]

The Trial Court in its preliminary instructions, instructed the jury that:

> "G. Raymond Trisler has the burden of proving his claims by a preponderance of the evidence. Executive Builders, Inc., Robert Montgomery and Dolores Montgomery have no burden to disprove G. Raymond Trisler's claims." (R. Vol VII, 1855, 21-25).

The Court in Hong v. Tabor at p. 1290 in footnote 11, noted that the ethics of an attorney's filing legal actions are subject to action by the Disciplinary Commission "...that inveighs against a lawyer filing suit...which he knows or when it is obvious that such action would serve merely to harass or maliciously injure another."

Acting on the advice of counsel is a complete defense to an action for malicious prosecution in either criminal or civil actions, both in this and in other jurisdictions.***[13]

Accord: 52 Am.Jur2d Malicious Prosecution, Sec. 78. Advice of private attorney, p.237.

Counsel for Appellants, after Allan Zukerman testified that Executive Builders acted on advice of counsel in filing the Complaint against Trisler, tendered Instruction No. 16 to the Trial Court who refused to give it, and refused to read it to the Jury:

---

[12] "*As long as there is probable cause to sue, there is no malicious prosecution.*" Matter of Linton, 136 F.3d 544, 547, (7th Cir. 1998), citing Lazarus Department Store v. Sutherlin, 544 N.E.2d 513, 524, Garrett v. City of Bloomington, 478 N.E.2d 89, 93 (Ind.App.1985); Gomez v. Adams, 462 N.E.2d 212, 222 (Ind.App. 1984).

[13] Applestein v. Preston, 353 So.2d 604, at 607, (Fla.App. 1976). "...The rule seems to be general that acting on the advice of counsel is a complete defense to an action for malicious prosecution of either of civil or criminal actions..."

by Michael Simmons summation to the jury as to punitive damages by appealing to the prejudices of the jury as to matters that Dolores Montgomery did outside the issues of the case, and to punish Robert Montgomery for being evil, solely because of his wealth, that requires the Trial Court to grant a new trial under Mainard v. Beider, 28 N.E. 196, (2 Ind.App. 1891), a vintage precedant.

D.

The punitive damages award of $1,640,000 against Robert Montgomery is so gross, and bears no reasonable relationship to any personal or economic injury, that it cannot be rationally explained other than prejudice, passion, or other improper element on the on the part of Jury which requires that it be set aside.

Point 1.

The Supreme Court of the United States in BMW of North America, Inc. v. Gore, 517 U.S. 559 (1996) held that the size of the award in that case was such that the result violated the due process clause of the Fourteenth Amendment on substantive grounds, and said that punitive damage awards must be reviewed for excessiveness on due process grounds. (517 U.S. at 568).

Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment but also of the severity of the penalty that a State may impose.

When a punitive damage award can fairly be categorized as "grossly excessive" in relation to the identification of the state interests that a punitive damage award is designed to serve, it enters the "zone of arbitrariness" that violates the Due Process Clause of the Fourteenth Amendment. Thus an appropriate inquiry

begins with identification of the State interests that an appropriate punitive damage award is designed to serve.

The Court analyzed each of the factors it set down and set down three (3) tests (517 U.S. at 574), saying:

> First, the degree of reprehensibility was not great;
>
> Second, there was no reasonable relationship between the punitive damage award and the compensatory damage award; and
>
> Third, the civil penalties for similar misconduct were far lower.

In the wake of *BMW*, both federal and state appellate courts have begun a "BMW" analysis of trial court punitive damage awards. Most opinions focus on the ratio between compensatory damages and punitive damages. *Federal*: *Watkins v. Lundell*, 169 F.3rd 540 (8th Cir. 1999), *cert. denied*, ___U.S.__, 120 S.ct. 324 (1999) (punitive damages of $3,500,000 based on actual damages of $235,000 set aside as constitutionally excessive; award should not exceed a 4 to 1 ratio); *Federal deposit Insurance Corp. v. Hamilton*, 122 F.3rd 854 (10th Cir. 1997) (compensatory damages of $44,000, punitive damages of $1,200,000 reduced on appeal to $264,000, applying *BMW*, a 6 to 1 ratio); *Neibel v. Trans World Assurance Co.*, 108 F.34d 1123 (9th Cir. 1997)(reasonable relation to compensatory damages required; 6 to 12 ratio not excessive under *BMW*. *State:* Alabama: *BMW of North America, Inc. v. Gore*, 701 N.E.2d 507 (Ala. 1997)(the Court reduced the $2,000,000 punitive damages award to $50,000); *Ford Motor Company v. Ammerman*, 705 N.E.2d 539 (Ind.App. 1999)(Indiana employs the same guideposts as Alabama).